(25,682)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 358.

A. S. COHN, PETITIONER,

vs.

R. A. MALONE, TRUSTEE OF A. S. COHN, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print
Caption	a	1
Transcript of record from the district court of the United States for the southern district of Georgia	c	1
Petition to superintend and revise	1	2
Notice to respondent and acceptance of service	4	3
Petition of trustee for surrender of insurance policies Nos. 189,847 and 189,846, issued by Penn Mutual Life Insurance Co.	5	4
Answer of bankrupt	8	6
Exhibit "A"—Duplicate assignment of policy No. 189,846 to Mrs. Ray Cohen	11	8
"B"—Duplicate assignment of policy No. 189,847 to Mrs. Ray Cohen	12	9
Amendment to answer of bankrupt	13	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1917.

	Original.	Print
Exhibit "A"—Policy No. 189,847	15	11
"B"—Policy No. 189,846	17	13
"C"—Acknowledgment by Insurance Co. of receipt of assignment	20	14
"D"—Original assignment of policy No. 189,847	21	15
"E"—Duplicate assignment of policy No. 189,847	22	16
Judgment of referee on petition of trustee for surrender of policies	23	17
Petition of bankrupt for review of judgment of referee.	24	18
Report of referee on petition for review	30	21
Opinion of the court on petition for review	32	23
Decree reversing judgment of referee	38	27
Clerk's certificate	39	27
Order of argument and submission	41	29
Opinion, Walker, J.	42	29
Judgment	48	33
Clerk's certificate	48	33
Writ of certiorari and return	50	35

a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1916, at Atlanta, Georgia, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable William I. Grubb, District Judge:

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Petitioner,

versus

A. S. COHN, Bankrupt, Respondent.

Be it remembered, that heretofore, to-wit, on the 13th day of June, A. D. 1916, a transcript of the record of the above styled cause, pursuant to a petition to superintend and revise from the Dis-
b trict Court of the United States for the Southern District of Georgia, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2939, as follows:

c *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2939.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Petitioner,

versus

A. S. COHN, Bankrupt, Respondent.

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Georgia.

[Original Record Filed June 13, 1916.]

U. S. Circuit Court of Appeals, Filed Jul- 5, 1916. Frank H. Mortimer, Clerk.

1 In the United States Circuit Court of Appeals, Fifth Circuit.

In the Matter of A. S. COHN, Bankrupt, in Bankruptcy.

To the Honorable, The Judges of the Circuit Court of Appeals of the United States for the Fifth Circuit:

The petition of R. A. Malone respectfully shows:

1. That he is the duly elected, qualified and acting Trustee in Bankruptcy of A. S. Cohn.

2. That on the first day of February, 1915, your petitioner as said Trustee presented his petition to the Referee in Bankruptcy for the Southern District of Georgia, before whom said Bankruptcy case was pending, praying that said Bankrupt, A. S. Cohn, be required to surrender to your petitioner as Trustee, two certain insurance policies, Nos. 189847, and 189846, issued by the Penn. Mutual Life Insurance Company, on the life of said Bankrupt, or pay to your petitioner the cash surrender value of said insurance policies, amounting to $966.18.

3. That on said date, said Referee passed an order requiring said bankrupt to appear before him on the 13th day of February, 1915, for the purpose of examinattion, and to show cause why the prayers of the said petitioner should not be granted.

4. That said bankrupt appeared in response to said order or rule to show cause, and filed his answer and amended answer thereto.

2 5. That afterwards, said petition came on to be heard before said Referee and was submitted to him upon said petition and answer as amended, the parties agreeing that these pleadings stated the facts of the case, and that the only issue to be decided was the conclusion of law to be drawn from the facts pleaded, and the said Referee on the 28th day of October, 1915, passed an order requiring the bankrupt to pay your petitioner the cash surrender values of said policies or to surrender said policies to your petitioner to the end that he might collect the cash surrender values of the same.

6. That said bankrupt filed his petition to have said order of said Referee reviewed by the District Judge, and said order and proceedings were certified to the District Judge as is usual in such cases, and on the 3rd day of March, 1916, the Honorable Emory Speer, District Judge, passed an order sustaining said petition for review, and decreed that said order of the Referee be reversed, and that the prayers of the Trustee in said case be denied.

7. That said order of said District Judge, of March 3rd, 1916, is erroneous for the following reasons, to-wit:

(*a*) Because said order is contrary to law.

(*b*) Because said order of the Referee was proper and legal and should not have been set aside.

(*c*) Because the pleadings showed that the Trustee was entitled to said policies of insurance, or the cash surrender values thereof.

(*d*) Because it appeared from the record that the insurance company had not assented to any direction of the insured that said poli-

cies should be made payable to his wife, and therefore said policies and the cash surrender values thereof passed to the Trustee, and are a part of the estate in bankruptcy.

3 8. That your petitioner files herewith a certified copy of so much of the record in said case as is material to a clear understanding of the issues raised by this petition.

Wherefore, your petitioner feeling aggrieved, because of said order of the District Judge of March 3rd, 1916, asks that the same may be revised in matter of law, by your Honorable Court, as provided in Section 24-*b* of the Bankruptcy law of 1898, and the rules and practice in such cases provided.

PEACOCK & GARDNER,
POPE & BENNETT,
ALEXANDER AKERMAN,
CHARLES AKERMAN,
Petitioner's Attorneys.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, R. A. Malone, petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge, information and belief.

R. A. MALONE.

Sworn to and subscribed before me, this the 13th day of March, 1916.

THOS. A. McNICHOLAS,
Notary Public, Dougherty County, Ga.

4 *Petition of Trustee to Superintend and Revise in Matter of Law Proceedings of the District Court of the United States for the Southern District of Georgia.*

In the United States Circuit Court of Appeals, Fifth Circuit.

In Bankruptcy.

In the Matter of A. S. COHN, Bankrupt.

To A. S. Cohn, Bankrupt, and Pottle & Hofmayer, J. W. Keive, and W. W. Crews, his Attorneys:

You are hereby notified that on the 31st day of March, 1916, we will file in the Clerk's office in the United States Circuit Court of Appeals for the Fifth Circuit, in the City of New Orleans, Louisiana, a petition for review in the above entitled cause, a copy of which petition is hereto attached as a part of this notice, and we will then ask

to have the case docketed and the necessary order made therein to have such case set down for hearing.

PEACOCK & GARDNER,
POPE & BENNETT,
ALEXANDER AKERMAN,
CHAS. AKERMAN,
Petitioner's Attorneys.

We hereby accept service of the above notice, this 13th day of March, 1916.

J. W. KIEVE,
W. W. CREWS,
POTTLE & HOFMAYER,
Attorneys for A. S. Cohn, Respondent.

* * * * * * *

5 In the District Court of the United States for the Southern District of Georgia, Albany Division.

In Bankruptcy.

In the Matter of A. S. COHEN, Bankrupt.

The petition of R. A. Malone, respectfully shows:

First.

That he is the duly qualified and acting trustee in the above named estate.

Second.

That the bankrupt is in possession of certain property, to-wit:

Insurance policy issued by the Penn Mutual Life Insurance Company on the life of the Bankrupt A. S. Cohen, for the sum of $2,000.00, said — having been issued on February 6th, 1905, said policy being issued in lieu of one bearing the same number, and dated February 26, 1901, and having a cash surrender value of $322.06 per thousand, or a total of $644.12;

Also insurance policy issued by the Penn Mutual Life Insurance Company upon the life of the Bankrupt, A. S. Cohen, for the sum of $1,000.00, on the first day of April, 1902, and was issued to take the place of one issued July 26, 1901, bearing the same number, and having a cash surrender value of $322.06.

The first named policy being numbered 189,847, and the last one being numbered 189,846.

Third.

Both of said above named policies were, by the bankrupt, on the 15th day of July, 1910, assigned, and transferred to his wife,
6 Ray Cohen, provided she outlived the insured, the policy otherwise to be payable to his estate, with full power in said

contract of assignment to the insured to change the beneficiary, or surrender the said policy to the company at any time. This act authorized to be done by an instrument in writing under the hand and seal of the Bankrupt.

Fourth.

The cash surrender value of each of said policies as above set forth is such property that could have been, by the Bankrupt, transferred prior to his adjudication in Bankruptcy, and is, therefore, property which should be turned over to your petitioner.

Fifth.

Petitioner further shows that the said A. S. Cohen, fails and refuses to assign said policies over to your petitioner, as Trustee for said estate, though demand has been made upon him to do so.

Wherefore, Petitioner prays that the Bankrupt be and appear before your Honor to be examined concerning each of said policies and to show cause why he should not surrender to him said policies, according to the Bankruptcy Act, that the cash surrender value thereof may become an asset for distribution among the creditors, and that he be required to produce said policies together with contract of assignment at said hearing.

R. A. MALONE,
Trustee of Said Bankrupt.

PEACOCK & GARDNER,
Attorneys for Trustee.

GEORGIA,
Dougherty County:

Personally appeared before me, an officer duly authorized by law to administer oaths in and for said state and county, R. A. Malone, who after being first duly sworn deposes, and says on oath that the facts and allegations set forth in the above and foregoing petition are true.

R. A. MALONE.

7 Sworn to and subscribed before me this 1st day of February, 1915.

T. A. McNICHOLAS,
N. P. Do. Co., Ga. O. G.

The above and foregoing petition read:

Thereupon, it is considered, ordered and adjudged by the Court that the Bankrupt, A. S. Cohen, be and appear before me on the 13th day of February, 1915, for the purpose of being examined concerning said insurance policies, and to produce said policies, together with the contract of assignments, and to show cause why he should

not surrender said insurance policies to the Trustee, or pay him the cash surrender value thereof.

This February 1st, 1915.

R. J. BACON,
Referee in Bankruptcy.

NOTE BY CLERK.—The Original of this Petition is not in the file in this case and for this reason this agreed on copy is used.)

Agreements.

I hereby certify to the best of my knowledge and belief that this is a true and correct copy of Petition of R. A. Malone, Trustee, in the A. S. Cohen, matter in regards to the Penn Mutual Life Insurance Company.

R. J. BACON,
Referee in Bankruptcy.

We hereby agree that the above is a true and correct copy of the original petition of R. A. Malone, Trustee in this matter.

J. W. KIEVE,
W. W. CREWS,
POTTLE & HOFMAYER,
Attorneys for A. S. Cohen.
POPE & BENNETT,
PEACOCK & GARDNER,
Attorneys for R. A. Malone, Trustee.

8 The above agreement was signed in my presence, this 17th day of March, 1916.

GEO. F. WHITE,
Deputy Clerk.

Indorsement: Petition of R. A. Malone, In Re Penn Mutual Life Ins. Company. Filed in office Feb'y 1st, 1915. R. J. Bacon, Referee.

In the District Court of the United States for the Southern District of Georgia, Albany Division.

In Bankruptcy.

In re A. S. COHEN, Bankrupt.

To the Honorable R. J. Bacon, Referee in Bankruptcy:

And now comes the above named bankrupt, A. S. Cohen, and respectfully files this his answer to the petition served upon him in said case filed by R. A. Malone, Trustee in said case, requiring him to show cause why he should not surrender certain insurance policies

COPY BOUN

issued by the Penn Mutual Life Insurance Company, or pay the trustee the cash surrender value thereof.

(1) Answering paragraph one,—defendant admits that R. A. Malone, is duly qualified, and acting trustee in the above named estate.

(2) Answering paragraph two,—defendant admits that he is in possession of the insurance policies described in said paragraph, and admits that the description contained in said paragraph is a correct description of the portion of the policies therein referred to.

(3) Answering paragraph three,—defendant admits that
9 on July 14, 1910, he assigned and transferred to his wife, Ray Cohen, "all right, title and interest whatsoever of in and to the policies numbered and described in the preceding paragraph." Defendant attaches hereto as a part of this answer, marked "Exhibit A" and "Exhibit B" copies of the duplicate assignments made by this defendant at the time of said transfers, which are attached to, and form a part of the policies described in the preceding paragraph.

(4) Defendant denies the conclusion of the pleader in paragraph four, that the cash surrender value of each of said policies is such property as could have been transferred by the bankrupt prior to his adjudication in bankruptcy and is therefore property which should be turned over to the trustee.

This defendant respectfully shows that the cash surrender value is not such property as should be turned over to the trustee, as hereinafter more fully shown.

(5) Answering paragraph five, defendant admits that he has refused to assign said policies to the trustee, for the reasons hereinbefore and hereinafter shown.

(6) Further answering, this defendant respectfully shows, and insists that the said policies of insurance described in the petition and in this answer, should not be turned over to the Trustee in Bankruptcy in said case, as a part of the assets of this defendant; nor should this defendant be required to pay the trustee the cash surrender value thereof, because the said policies, and the cash surrender value thereof, are the property of his wife Ray Cohen, who is and was the beneficiary named in said policy, having been so named since July 15, 1910.

Defendant respectfully shows that under the laws of Georgia, and particularly under Section 2498 of the Code of 1910, that any monies to be paid under said policy have been directed by this defendant, the assured, to be paid to his wife, the beneficiary; that this defend-
ant has not exercised any option given under said policy, nor
10 given any other directions with reference thereto, except as stated herein; and therefore under said laws, neither the Trustee, nor any other person occupying a similar position, can defeat the directions heretofore given by this defendant and assented to by said assured. The Code Section referring to contracts of Life Insurance is as follows: "The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to

D CLOSE IN CENTER

by the insurer, no other person can defeat the same. But the assignment is good without such assent."

Wherefore the premises considered this defendant respectfully shows, that neither of said policies, nor the cash surrender values thereof, are such assets as the trustee in bankruptcy has any right to administer on; and this defendant has heretofore, and now claims the same as exempt under the bankruptcy laws enacted by Congress, and under the laws of Georgia heretofore referred to; and this defendant respectfully prays that he be hence discharged.

J. W. KIEVE,
W. W. CREWS,
POTTLE & HOFMAYER,
Attorneys for A. S. Cohen, Albany, Ga.

GEORGIA,
Dougherty County:

Personally appeared before the undersigned, an officer duly authorized by law to administer oaths, A. S. Cohen, who being sworn, says, that the facts stated in the foregoing answer are true.

A. S. COHEN.

Sworn to and subscribed before me this 12th day of February, 1915.

[SEAL.]

B. L. COLLIER,
N. P., Dougherty County, Georgia.

11 EXHIBIT "A".

(Duplicate.)

Assignment—Absolute.

For value received, I hereby sell, assign, transfer and set over all right, title and interest whatsoever of, in and to Policy No. 189846 on the life of Aaron S. Cohen (the insured) in the Penn Mutual Life Insurance Company of Philadelphia, unto my wife, Ray Cohen, if she outlives me, otherwise to my estate with full power to the insured to change the beneficiary or surrender this policy to said Company at any time, this is to be done by instrument in writing, under his hand and seal, to be recorded at the Home Office of the Company.

The signature to this assignment is a warranty that the undersigned is the sole and absolute owner of said policy and of all rights incident thereto; that his interest or any part thereof is not assigned, and that no proceedings in bankruptcy are pending against him.

In case this assignment is signed by more persons than one, the legal effect of the foregoing shall be the same as if all references to the undersigned were in the plural instead of the singular; and in that event all obligations assumed hereunder shall be deemed to be joint and several obligations.

COPY BOUND

This assignment is made subject to the claims of the Penn Mutual Life Insurance Company now holding this policy as collateral security for a loan.

Witness my hand and seal at Albany, State of Georgia, this 15th day of July, 1910.

AARON S. COHEN. [L. S.]

Signed, sealed and delivered in the presence of:
DANIEL MAYER.
A. S. STERNE,
Notary Public, Dougherty County, Georgia.

N. B.—This duplicate assignment should be signed by both beneficiary and insured. This duplicate to be attached to policy.

12 EXHIBIT "B".

(Duplicate.)

Assignment—Absolute.

For value received, I hereby sell, assign, transfer and set over all right, title and interest whatsoever of, in and to Policy No. 189847 on the life of Aaron S. Cohen (the insured) in the Penn Mutual Life Insurance *Policy* of Philadelphia, unto my wife, Ray Cohen, if she outlives me, otherwise to my estate with full power to the insured to change the beneficiary or surrender this policy to said Company at any time, this is to be done by instrument in writing, under his hand and seal, to be recorded at the Home Office of the Company.

The signature to this assignment is a warranty that the undersigned is the sole and absolute owner of this Policy and of all rights incident thereto; that his interest or any part thereof is not assigned, and that no proceedings in bankruptcy are pending against him.

In case this assignment is signed by more persons than one, the legal effect of the foregoing shall be the same as if all references to the undersigned were in the plural instead of in the singular; and in that event all obligations assumed hereunder shall be deemed to be joint and several obligations.

This assignment is made subject to the claims of the Penn Mutual Life Insurance Company now holding this policy as collateral security for a loan.

Witness my hand and seal at Albany, State of Georgia, this 15th day of July, 1910.

AARON S. COHEN. [L. S.]

Signed, sealed and delivered in the presence of:
DANIEL MAYER.
A. S. STERNE,
Notary Public, Dougherty County, Georgia.

This duplicate to be attached to policy.

N. B.—This duplicate assignment should be signed by both beneficiary and insured.

CLOSE IN CENTER

13 Indorsement: Answer of Bankrupt to petition of Trustee on Insurance Policies of the Penn Mutual Life Ins. Company. Filed Feb. 13, 1915. R. J. Bacon, Referee.

In the District Court of the United States, Southern District of Georgia, Albany Division.

In Bankruptcy.

In re A. S. COHEN, Bankrupt.

And now comes the above named bankrupt, A. S. Cohen, and by leave of the Court first had and obtained, amends his answer to the petition served upon him in this case, filed by R. A. Malone, Trustee in said case, requiring him to show cause why he should not surrender two insurance policies, issued by the Penn Mutual Life Insurance Company, No. 189847 and 189846 respectively, or pay the trustee the cash surrender value thereof, by adding the following:

(7) Defendant attaches hereto, marked "Exhibit A" a substantial copy of the material portions of Policy No. 189847 referred to in the petition and answer, marked "Exhibit A" and made a part hereof.

(8) Defendant attaches hereto, marked "Exhibit B" a substantial copy of the material portions of Policy No. 189846 referred to in the petition and answer, marked "Exhibit B" and made a part hereof.

(9) Defendant shows that both of said policies were assigned and transferred to his wife, Ray Cohen, on July 15, 1910, in manner and form hereinafter set out, and notice thereof given to the Company of the desire of the petitioner that the same should be
14 done, and directing said company to make said change on the forms prepared by said company for that purpose. Said company on July 19, 1910, acknowledged receipt of the same, as per copy letter attached hereto marked "Exhibit C" and made a part hereof.

The form of assignment on July 15, 1910, was executed by this defendant in duplicate for both of said policies. The original was mailed to the company at its home office in Philadelphia, Pa., and received and recorded by it on July 19, 1910, and the duplicates of the original were attached to both of said policies, and this is the usual form used by the company in such cases, and was the form furnished to this defendant by the insurance company upon his request to them, that his wife be made the beneficiary in said policies.

(10) Defendant attaches hereto marked "Exhibit D" a photographic copy of the original assignment referred to as the same was received by the insurance company at Philadelphia, Pa., on July 19, 1910, and as the same now appears in the home office of the company.

(11) Defendant shows that attached to the policy in question is an identical copy of said assignment, except that the same is marked

COPY BOUND

duplicate at the top instead of original, a typewritten copy of the same being hereto attached, made a part hereof, marked "Exhibit E". The Exhibits "D" and "E" referred to are made with reference, only to Policy 189847, but the entries of the assignment are the same with reference to Policy 189846, except that the number on the assignment is made 198846 instead of 189847. Defendant shows that he paid the premiums on both of said policies.

J. W. KIEVE,
W. W. CREWS,
POTTLE & HOFMAYER,
Defendant's Attorneys, Albany, Ga.

The foregoing amendment allowed this Oct. 28th, 1915.

R. J. BACON,
Referee in Bankruptcy.

15 EXHIBIT "A."

The Penn Mutual Life Insurance Company of Philadelphia.

Number 189847. Amount $2000.

Age 42.

Sum Insured $2,000.

Yearly Premium $82.52.

For 20 Years.

In consideration of the application for this policy, hereby made a part of this contract, The Penn Mutual Life Insurance Company of Philadelphia insures the life of Aaron S. Cohen (the insured) of Albany, in the County of Dougherty, State of Georgia, in the sum of two thousand dollars, and promises to pay at its Home Office, in the City of Philadelphia, unto his .....
.....
.....
executors, administrators or assigns, the said sum insured, upon receipt of satisfactory proof of the death of the insured, during the continuance in force of the policy, upon the following conditions, namely:

The Payment in Advance to the Company, at its Home Office, of the sum of one hundred and ninety-five .01/100 dollars, at the date hereof, and of the annual premium of eighty-two and 52/100 dollars at or before three o'clock P. M. on the twenty-fifth day of July .. in every year during the life of the insured, or until twenty full year's premiums shall have been paid (from July 25, 1901, ...).

This policy shall participate annually in the surplus earnings of the Company in accordance with the regulations adopted by the Board of Trustees.

The extended insurance, paid-up insurance, and loan or cash surrender value privileges, benefits, and conditions stated on the second

CLOSE IN CENTER

16

Limited Life Policy
Regular.
Examined by J. J. B.
L. L. } Policy Form
A. D. } No. 2.
Ed. 8, 1901.

page hereof form a part of this contract as fully as if recited at length over the signature hereto affixed.

In witness whereof, the Mutual Life Insurance Company of Philadelphia caused this policy to be signed by its President, Secretary, and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, the sixth day of February, 1905.

HARRY T. WEST, *President.*
WM. A. KINSLEY, *Secretary.*

Attest:
A. G. GREENE, *Registrar.*
JESSE J. BARKER, *Actuary.*

(Stamped on the margin of page one of policy.)
This policy is issued in the place of one bearing the same number and dated July 26, 1901, which policy has been released and cancelled, and this new policy is to have the same privileges as if issued July 25, 1901.

J. J. BARBER, *Actuary.*

III. Assignment. Any Assignment of this Policy shall be attached hereto, and a duplicate thereof shall be furnished the company. Any claim against the Company arising under any assignment of this Policy shall be subject to proof interest. No assignment shall impose and obligation on this Company until it has received the original or duplicate thereof, nor does the Company guarantee the sufficiency or validity of any assignment.

x. Loan Value. The Company will, at any time after three years' premiums have been paid in cash, while the Policy is in force
17 by payment of premiums, lend thereon upon its satisfactory assignment as collateral security, the sum provided for in the table of values given below. No loans will be made for a less sum than fifty dollars, and only in multiples of five dollars, and shall be diminished by any indebtedness outstanding against the poicy.

Table of Extension, Paid-up, and Loan or Cash Values, Provided for by the Policy, if no Indebtedness Exists Against it.

At end of year.	Term of extention for this policy.	These values are for $1,000 insurance. For this policy multiply by two.	
		Paid-up insurance on surrender.	Loan or cash surrender value.
13th	15 years, 150 days.....	650	$322.06

COPY BOUN

EXHIBIT "B."

The Penn Mutual Life Insurance Company of Philadelphia.

Number 189846. Amount $1000.

Age 42.

Sum Insured $1,000.

Yearly Premium $41.26.

For 20 Years.

In consideration of the application for this policy, hereby made a part of this contract, The Penn Mutual Life Insurance Company of Philadelphia insures the life of Aaron S. Cohen (the insured) of Albany, in the County of Dougherty, State of Georgia, in the sum of .... thousand dollars, and promises to pay at its Home Office, in the City of Philadelphia, unto Gussie Jacobs, sister of the insured, and Isadore Cohen, brother of the insured, in equal shares, or to

18 the survivor of them; should neither of them survive the insured, then to the insured's executors, administrators or assigns, the said sum insured, upon receipt of satisfactory proof of the death of the insured, during the continuance in force of the policy, upon the following conditions, namely:

The payment in advance to the Company, at its Home Office, of the sum of twenty-three and 10/100 dollars, at the date hereof, and of the annual premium of forty-one and 26/100 dollars at or before three o'clock P. M. on the twenty-fifth day of July .. in every year during the life of the insured, or until twenty full year's premiums shall have been paid (from July 25, 1901 ....).

This policy shall participate annually in the surplus earnings of the Company in accordance with the regulations adopted by the Board of Trustees.

The extended insurance, paid-up insurance, and loan or cash surrender value privileges, benefits, and conditions stated on the second page hereof form a part of this contract as fully as if recited at length over the signature hereto affixed.

VI. Assignment. Any assignment of this policy shall be attached hereto, and a duplicate thereof shall be furnished the Company. Any claim against the Company arising under any assignment of this policy shall be subject to proof interest. No assignment shall impose and obligation on this company until it has received the original or duplicate thereof, nor does the company guarantee the sufficiency or validity of any assignment.

19 x. Loan Value. The Company will, at any time after three years' premiums have been paid in cash, while the policy is in force by payment of premiums, lend thereon upon its satisfactory assignment as collateral security, the sum provided for in the table of values given below. No loans will be made for a less sum than fifty dollars, and only in multiples of five dollars, and shall be diminished by any indebtedness outstanding against the policy.

D CLOSE IN CENTER

Table of Extension, Paid-up, and Loan or Cash Values, Provided for by the Policy, if no Indebtedness Exists Against it.

At end of year.	Term of extention for this policy.	These values are for $1,000 insurance. For this policy multiply by one. Paid-up insurance on surrender.	Loan or cash surrender value.
13th	15 years, 150 days.....	650	$322.06

The insured shall have full power while this policy is in force and not previously assigned, to change the present beneficiary or beneficiaries; such change shall be made by instrument in writing and shall take effect only upon its indorsement upon the policy by the company at its Home Office.

Limited Life Policy
Regular.
Examined by J. J. B.
L. L. } Policy Form
A. D. } No. 2.
Ed. 8, 1901.

In witness whereof, the Penn Mutual Life Insurance Company of Philadelphia has caused this policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, the first day of April, 1902.

20

HARRY T. WEST, *President.*
VENNY C. BROWN, *Secretary.*

Attest:
A. G. GREENE, *Registrar.*
JESSE J. BARKER, *Actuary.*

(Stamped on the margin of page one of Policy.)
This policy is issued in the place of one bearing the same number and dated July 26, 1901 which policy has been released and cancelled, and this new policy is to have the same privileges as if issued July 25, 1901.

J. J. BARBER, *Actuary.*

EXHIBIT "C."

The Penn Mutual Life Insurance Company, Philadelphia.

W., July 19, 1910.

Mr. A. S. Cohen, Albany, Ga.

DEAR SIR: Your favor of the 15th inst. is received enclosing "original" assignment of interest dated July 15, 1910, of Policy 189846-7 on the life of yourself "Aaron S. Cohen."

We have attached the duplicates to the policies which are held here as security for loans.

We have filed this paper, with the application for the Policy for future reference when necessary, but without any responsibility on

COPY BOUN

the part of the Company, as to the sufficiency or the validity of the assignment.

Yours truly,

J. BURNETT GIBB,
Actuary.

R.

No. 433, Ed. 7-14-3000.

21 Copy.

EXHIBIT "D."

Assignment—Absolute.

For value received, I hereby sell, assign, transfer and set over all right, title and interest whatsoever, of, in and to .... Policy No. 189847 on the life of Aaron S. Cohen (the insured) in The Penn Mutual Life Insurance Company of Philadelphia, unto my wife, Ray Cohen, if she outlives me, otherwise to my estate, with full power to the insured to change the beneficiary or surrender this Policy to said Company at any time, this to be done by instrument in writing under his hand and seal to be recorded at the Home Office of the Company.

The signature to this assignment is a warranty that the undersigned is the sole and absolute owner of said policy and of all rights incident thereto; that his interest or any part thereof is not assigned; and that no proceedings in bankruptcy are pending against him.

In case this assignment is signed by more persons than one, the legal effect of the foregoing shall be the same as if all reference to the undersigned were in the plural instead of the singular; and in that event all obligations assumed hereunder shall be deemed to be joint and several obligations.

This assignment is made subject to the claim of The Penn Mutual Life Insurance Company now holding this policy as collateral security for a loan.

Witness my hand and seal at Albany, Ga., State of Ga., this 15th day of July, 1910.

AARON S. COHEN. [L. S.]

One witness required to each signature. —— ——. [L. S.]

—— ——. [L. S.]

7/19/10.
Signature examined.

THOMAS.

Signed, sealed and delivered in presence of:
DANIEL MAYER.

22 Witness:
A. L. STERNE,
Notary Public, Dougherty County, Georgia.

Recorded 7/19/10.

L. J. R.

ND CLOSE IN CENTER

N. B.—The original assignment should be signed by both beneficiary and insured.

This original must be sent to the Home Office of the Company at Philadelphia.

EXHIBIT "E."

(Duplicate.)

Assignment—Absolute.

For value received, I hereby sell, assign, transfer * * * and set over .... all right, title and interest whatsoever .... of, in and to .... Policy No. 189847 on the life of Aaron S. Cohen (the insured) in The Penn Mutual Life Insurance Company of Philadelphia, unto my wife, Ray Cohen, if she outlives me, otherwise to my estate with full power to the insured to change the beneficiary or surrender this policy to said Company at any time, this is to be done by instrument in writing, under his hand and seal, to be recorded at the Home Office of the Company.

The signature to this assignment is *is* a warranty that the undersigned is the sole and absolute owner of said policy and of all rights incident thereto; that his interest or any part thereof is not assigned and that no proceedings in bankruptcy are pending against him.

In case this assignment is signed by more persons than one the legal effect of the foregoing shall be the same as if all references to the undersigned were in the plural instead of in the singular and in that event all obligations assumed hereunder shall be deemed to be joint and several obligations. This assignment is made subject to the claims of the Penn Mutual Life Insurance Company now holding this policy as collateral security for a loan.

23 Witness my hand and seal at Albany, Ga., State of Ga., this 15th day of July, 1910.

AARON S. COHEN.

Signed, sealed and delivered in presence of:

DANIEL MAYER.

(One witness required for each signature.)

A. L. STERNE,
Notary Public,
Dougherty County, Georgia.

[Copy of Seal.]

"A. L. STERNE,
Notary Public,
Dougherty County, Ga.

N. *P.*—This duplicate assignment should be signed by both beneficiary and insured—This duplicate to be attached to policy.

All papers must be signed in ink. Pencil signatures cannot be accepted.

COPY BOUND

Indorsement. Amended answer to Petition to deliver Ins. Policies in Penn Mutual Life Ins. Co. In the Matter of A. S. Cohen, Bankrupt.

In the District Court of the United States, Southern District of Georgia, Albany Division.

In Bankruptcy.

In re A. S. COHEN, Bankrupt.

The above stated matter coming on this day to be heard upon the petition of R. A. Malone, Trustee, requiring the bankrupt to show cause why he should not surrender certain insurance policies, issued by the Penn Mutual Life Insurance Company, same being numbered 189847 and 189846, or pay the trustee the cash surrender value thereof, and the said case being heard upon this issues as made
24 by the pleadings, including those of the amended answer of defendant, which are admitted to be true, there being no dispute of fact, and the question to be decided being one of law;

Now, therefore, after argument, it is ordered and adjudged; that if appearing from an examination of the policies in question, that the insurance company has not assented to any direction of the insured that the same should be made payable to his wife, by any writing which appears upon the policy, as a part thereof or as an exhibit attached or otherwise, the said bankrupt is hereby directed to pay the trustee in said case the cash surrender value of the policies, or to surrender said policies to the trustee to the end that he may collect the cash surrender values of the same.

This October 28, 1915.

R. J. BACON,
Referee in Bankruptcy.

Indorsement: Order and Judgment on Policies Nos. 189847 and 189846. Filed Oct. 28/15. R. J. Bacon, Referee.

D CLOSE IN CENTER

The Petition of Trustee to Surrender Two Insurance Policies in the Penn Mutual Life Insurance Company, Nos. 189847 *and* 189846, *or Pay the Cash Surrender Value Thereon.*

In the District Court of the United States, Southern District of Georgia, Albany Division.

In Bankruptcy.

In re A. S. COHEN, Bankrupt.

To the Honorable R. J. Bacon, Referee in Bankruptcy:

The petition of A. S. Cohen, the above named bankrupt, respectfully shows:

25 (1) That on February 1, 1915, R. A. Malone, Trustee in Bankruptcy in the above stated case, filed in the office of the Referee a petition for the purpose of requiring this petitioner to surrender to him two insurance policies issued by the Penn Mutual Life Insurance Company on the life of this petitioner, or to pay the cash surrender value thereof. One of these policies was for $2,000.00 and one for $1,000.00, being numbered respectively 189847 and 189846; the first one having been issued on February 6, 1905, and the second one having been issued on April 1, 1902; the first having a cash surrender value of $644.12 and the second one a cash surrender value of $322.06.

Said petition alleged that said policies had been transfer-ed by this petitioner on July 15, 1910, to his wife, Ray Cohen, provided she outlived the insured; otherwise the policies were payable to his estate with full power to the insured to change the beneficiary or surrender the policies to the company at any time.

Upon the petition filed as aforesaid, to which reference is here made, and order was duly issued by the Referee on February 1, 1915, requiring this petitioner to appear before him on February 13, 1915, and show cause why the prayers of the petition should not be granted.

(2) Said case was duly heard on February 13, 1915, and not being completed was regularly continued from time to time until October 28, 1915, at which time this petitioner (defendant in the original proceedings) filed an amendment to the original answer filed by him on February 13, 1915, which was duly allowed.

(3) In this Petitioner's answer and in his amendment he attached material portions of the policies referred to in the original petition and showed that both of them were assigned and transferred to his wife on July 15, 1910, in accordance with the forms furnished by the company for such purposes, copies of which were attached to his amended answer, and this petitioner claimed that none of the

26 prayers of the original petition should be granted; because the cash surrender value of said policies was not such property as could have been transferred by the bankrupt prior to his adjudication in bankruptcy on January 12, 1915, and was therefore not

COPY BOUNI

property which should be turned over to the Trustee; and because under the admitted facts, both under the bankruptcy law and under the law of Georgia, said property was property right of this petitioner's wife, and was exempt both under the bankruptcy laws enacted by Congress and under the laws of Georgia, and the same was not an asset of this petitioner to be administered by the Trustee under the terms of the policy or under the law of Georgia, or under the laws of Congress.

(4) The matter was duly submitted to the Referee on October 28, 1915, the case being heard upon the issues made by the pleadings, including those of the amended answer of the defendant which were admitted to be true, and there being no dispute of fact, and the question to be decided being one of law, the Referee on October 28, 1915, after reciting the foregoing facts passed the following order:

"Now, therefore, after argument, it is ordered and adjudged, that it appearing from an examination of the policies in question, that the insurance company has not assented to any direction of the insured that the same should be made payable to his wife, by any writing which appears upon the policy, as a part thereof or as an exhibit attached thereto or otherwise, the said bankrupt is hereby directed to pay to the trustee in said case the cash surrender values of the policies, or to surrender said policies to the trustee to the end that he may collect the cash surrender values of the same."

Your petitioner then and there excepted to the passing of said order and now excepts and assigns the same as error, and being dissatisfied with the passing of said order and desiring a review of the same, files this his petition that the question herein presented may be certified to the Judges of the District Court of said Division, together
27 with said order and the original petition, and the preliminary order issued on the same, and the answer and amended answer of the defendant as hereinbefore set out, as required by law.

(5) Petitioner assigns said order as error for the reason that the prayers of petitioner in said case should not have been granted, and for the reason that the prayers of this petitioner (defendant in the original proceedings) should have been granted, and the petition dismissed, because under the pleadings and facts stated therein, the case being tried on the facts set out in the pleadings, petitioner in said case was not entitled to the relief prayed for and given under the order herein complained of.

(6) Petitioner assigns said order as error for the reason that under the facts upon which the case was tried, that this petitioner, who was adjudicated a bankrupt on January 12, 1915, had prior thereto at a time when he was solvent, to-wit, on July 15, 1910, transferred and assigned his interest in the policies to his said wife, and that said policies and the cash surrender value thereof were the property of his wife, and the same were not assets to be administered by the Trustee in Bankruptcy.

(7) Petitioner further shows that said order was error, because under the laws of Georgia, and particularly under Section 2498 of the Civil Code of 1910 that any monies to be paid under said policies,

ND CLOSE IN CENTER

had been directed by this petitioner (the assured) to be paid to his said wife, the beneficiary, said direction having been given on July 15, 1910, and that since said time this petitioner has not exercised any option given in the policies, nor given any other direction with reference thereto; and therefore, neither the Trustee in Bankruptcy, nor any other person occupying a similar position could defeat the direction heretofore given by this petitioner and assented to by the insurer; your petitioner contended and now contends that the
28 facts showed that a legal direction had been given to the insurer by this petitioner, assented to by the insurer, and that the finding and judgment of the Referee to the contrary was erroneous under the facts.

(8) Your petitioner further assigns said order as error because under the facts of the case, this petitioner had made a valid assignment of the policy, and of its cash surrender value to his wife, and under the laws of Georgia the same was in proper form, and the policies were therefore not an assets to be administered by the Trustee.

(9) Petitioner further assigns said order as error for the reason that under the Acts of Congress relating to Bankruptcy and under the laws of Georgia, neither the policies, nor the cash surrender values thereof, were an asset to be administered by the Trustee; but that the same were property rights of his wife of which he could not be deprived by the action of the Trustee in Bankruptcy in administering upon the estate of this petitioner, under the terms of the policies, and under the facts shown in the pleadings upon which the case was tried.

(10) Petitioner further assigns said order as error, for the reason that Section 2498 of the Civil Code of Georgia provides as follows: "The assured may direct the money to be paid to his personal representative or to his widow, or to his children, or to his assignee, and upon such direction given, and assented to by the insurer no other person can defeat the same. But the assignment is good without such assent."

Petitioner assigns said order as error for the reason that he (the assured) had directed any monies to be paid under said policies to be paid to his wife, the beneficiary, which had been assented to by the insurer, and petitioner had assigned the policies to his said wife, and, therefore the same were exempt under the laws of Georgia from any debt of this petitioner and, under the bankruptcy law, were not an assent of his to be administered by the Trustee in Bankruptcy;
29 nor could this petitioner or any one for him, be required to pay to said Trustee the cash surrender value thereof.

And now within the time allowed by law, petitioner presents his petition for review of said order and prays that the Honorable Referee shall forthwith certify to the Judges of the District Court of said Division, the questions herein presented, with a summary of the evidence relating thereto, as shown by the pleadings, together with the pleadings in said case, and the finding and order of the

Referee thereon, that the errors alleged to have been committed may be considered and corrected.

This November 5th, 1915.

J. W. KIEVE,
W. W. CREWS,
POTTLE & HOFMAYER,
Attorneys for Petitioner.

P. O. Address, Albany, Ga.

GEORGIA,
Dougherty County:

Personally appeared before the undersigned, an officer duly authorized by law to administer oaths A. S. Cohen, who being sworn says that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

A. S. COHEN.

Sworn to and subscribed before me, this 5th day of November, 1915.

F. H. BATES,
N. P. Dougherty County, Georgia.

Indorsement: Petition for Review by A. S. Cohen of Order of Referee with reference to policies in Penn Mutual Life Ins. Co. #189847 and 189846. Filed in office this Nov. 5, 1915. R. J. Bacon, Referee in Bankruptcy.

30 In the District Court of the United States for the Albany Division, Southern District of Georgia.

In Bankruptcy.

In the Matter of A. S. COHEN, Bankrupt.

To the Honorable Emory Speer and W. W. Lambdin, Judges:

Respectfully represents R. J. Bacon, Referee before whom was heard the petition of the Trustee to surrender Insurance Policy in the above stated cause.

1.

That an order was granted as set forth in petition for review filed by A. S. Cohen, Bankrupt, which was passed upon the evidence set forth in the petition for review, the same being a determination purely of a question of law, there being no issue of facts.

2.

The basis of the Referee's decision upon which a petition for review has been filed by said Cohen, was Section 2498 of the Code of

Georgia, which provides "The assured may direct the money to be paid to his personal representatives or to his widow, or to his children, or assignees, and upon such direction given and assented to by the insurer no other person can defeat the same. But the assignment is good without such assent." The Referee was very doubtful of the proposition of said Code Section being applicable but gave the bankrupt the benefit of the doubt and applied the Code Section as he interpreted and understood it. In this application one of the policies, that of the New York Life Insurance Company was ordered surrendered by the Trustee, and the one in question, that of the Penn Mutual Life Insurance Company, the Trustee was directed to collect the cash surrender value, because as shown in the order
31 and appearing as a matter of fact from the Policy "The Insurance Company has not assented to any direction of the assured, that the same (Policy) should be made payable to his wife by any writing which appears upon the policy as a part thereof, or as an exhibit attached thereto or otherwise." It is the understanding of the Referee that the title to insurance policy when the beneficiaries can be changed by the insured is an asset of the insured unless this right has been exercised and assented to by the insurer, in which event the Referee is really still doubtful, but that the policy would pass to the Trustee in Bankruptcy, unless it was made so payable that in the event of the death of the beneficiary it would go to the heirs or representatives of the beneficiaries. However being doubtful as to this proposition as before stated the Referee applied the Code Section in the bankrupt's favor as to the New York Life Insurance Policy, said Section being against the bankrupt as to the Penn-Mutual Policy.

Referee sends up all the record pertinent to this matter for the inspection of the Court, to-wit:

1. Petition of the Trustee to have the insurance policy surrendered.
2. The answer of the defendant.
3. The order of the undersigned Referee on the hearing.
4. Petition for Review.

Respectfully submitted,

R. J. BACON, *Referee.*

Indorsement: Report of Referee on Petition for Review. Filed in office, Dec. 24, 1915. Geo. F. White, Deputy Clerk.

32 *Petitions to Review Findings of Referee Heard at Albany, Ga.*

February 10th, 1916, December Adjourned Term, 1915; Decided February 23rd, 1916.

In the District Court of the United States for the Southern District of Georgia, Albany Division.

In Bankruptcy.

In the Matter of A. S. COHEN, Bankrupt.

Appearances:

For Trustee—Messrs. Pope & Bennett, Messrs. Peacock & Gardner.
For Bankrupt—Messrs. Pottle & Hofmayer, J. W. Kieve, Esq., W. W. Crews, Esq.

SPEER, *District Judge:*

The bankrupt in this case has three life insurance policies, two in the Penn Mutual, and one in the New York Life, Insurance Companies. These were issued about the year 1901. At the date of bankruptcy, the beneficiary designated in each policy was the wife of the insured. This designation has been recorded some five years prior thereto. The right to change the beneficiary was reserved to the insured under all three policies. This appears from a designation in the wife's favor made by the insured, and assented to by the Company, in the case of the New York Life policy. There were assignments to the wife of the other policies. In both the designations and the assignments the right to change the beneficiary was reserved. It has been ascertained that at the date of adjudication, the New York Life policy had a cash value of $457; and that the Penn Mutual policies had cash values of $644.12 and $332.09 respectively. The Trustee, relying upon Section 70-*a* of the Bankruptcy Act, filed his petition to require the bankrupt to pay into Court, the cash
33 value of these policies to be administered as assets of the bankrupt. The petition was heard by the Referee, and he held that the Trustee was entitled to the cash values of the Penn Mutual policies, but was not entitled, under the New York Life policy. He distinguished substantially because, in the New York Life policy the designation of the beneficiary was assented to by the company This, he holds, under the Georgia law, exempts it from the claim of the Trustee. The Penn Mutual policies, while showing a designation of the wife as beneficiary by the insured, did not show the assent of the insurance company. For this reason, he holds that the cash values of the latter policies — not within the effect of the Georgia statute. Petitions for review were filed in behalf of the Trustee, and in behalf of the bankrupt.

The essential facts are undisputed. The question turns upon the effect of the Georgia statute referred to, when construed in connec-

tion with the relating provision of the Bankruptcy Law. The Georgia Code Section is as follows:

"The assured may direct the money to be paid his personal representatives or to his widow, or to his children, or assignees, and upon such direction given and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent." Park's Annotated Code of Georgia. Sec. 2498.

Now, the bankruptcy law, Section 70-*a* applying to this question, is as follows:

"(5) The Trustee of the estate of a bankrupt *x* shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except so far as it is to property which is exempt. * * * (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when a bankrupt shall have any insur-
34 ance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustees as assets."

In the application of this language, to the facts of the cae, it is essential to inquire, first, whether the bankrupt had title to the cash value of the policies; second, whether, construed in pari materia with the Georgia Statute, Cohen had the power to transfer his interest to such cash values therein; again, whether they might have been levied upon and sold under judicial process; and again, whether there was, in the language of the Act, "a cash surrender value payable to himself, his estate, or personal representatives." We think that all of these questions should be answered in the negative. The provision of the Bankruptcy Law above quoted, must be held to relate to policies to which the bankrupt had title, or which he could have transferred, or which might have been levied upon and sold under judicial process. It can have no relation to a policy of which he has made his wife beneficiary, and where the State Law protects her beneficial interest. Here, the legal title was in the wife. It is urged, that he could have changed the beneficiary. If this be possible, in view of the Georgia Statute, he had not done so on the date of the adjudication; he had directed, years before bankruptcy, that the proceeds of the policies be paid to his widow, and while it does not appear, that this direction had been assented to by the Penn Mutual Company, no reason appears why they should not have assented, and the assent might have been compelled. Id certum est quod certum reddi potest. Besides, the explicit language of the Code is, that the assignment is good without such assent. Can it be said then,
35 that the right to the cash value could have been transferred or levied upon, and sold under judicial process; and could, at the date of adjudication, have been made available for creditors?

There are authorities which seem to answer this in the affirmative. See in re Herr, 182 Fed. 716; in re Diack, 100 Fed. 770; in re Boardman, 103 Fed. 783; in re Coleman, 136 Fed. 818. But it will be found, we think, that these precedents relate to the proceeds of the policy where the bankrupt or his legal representatives was the beneficiary, or that the decisions were rendered in States where no such conclusive protection was thrown around the designation of the widow and children as beneficiaries, as that afforded by the law of Georgia.

Where there is no fraud, and where the designation of the beneficiary is made several years before bankruptcy, indeed, if made in good faith more than four months before bankruptcy, in the language of the Georgia law, "no other person can defeat the same." This language is imperative and seems to throw an impregnable defense around the designated beneficiary. This of course, where there is an insurable interest as in the case of the wife and children. The language, "no other person can defeat the same" imports we think, that no creditor can defeat the same, nor can the Trustee do so.

Reliance is placed by the Trustee, upon the obiter of Chief Justice Lumpkin, in Greenville vs. Crawford, 13 Ga. 355. There a policy had been assigned to a creditor for debt, with the stipulation that in event of the death of the insured, the proceeds of the policy should be first subjected to the debt of the assignee, and the balance to be turned over to the wife as beneficiary of the insured. There was, however, in that case, no contest as to the right of the creditor, but Chief Justice Lumpkin, seemed to distinguish the rights of a creditor as superior to the right of the beneficiary of the policy. Section 2498 of the Code, is clearly traceable to this case. Thomas R. R. Cobb, the famous codifier, was careful to incorporate the principle for the protection of the wife and children, but as carefully, omitted to include the obiter of the great Chief Justice. The lan-
36 guage of the section has remained unchanged in each of the numerous successive re-enactments of the Code; and we therefore conclude that in Georgia, the language, "no other person can defeat" imports that the Trustee in Bankruptcy cannot defeat.

The question is without precedent, for the learned counsel for the trustee and for the wife of the bankrupt, have been unable to call attention to a case where this section of the Code has been construed in connection with 70-*a* of the Bankruptcy Act, supra. In all the cases cited, where after death, the proceeds of the policies were claimed by creditors, and by the wife, when she was beneficiary, the wife has prevailed. In some states, statutes of exemption provide for the contingent intervention of bankruptcy, but Section 2498 of the Code of Georgia, under consideration, makes no mention of bankruptcy.

Aside from the Georgia, statute and important consideration depends upon the nature of the cash value of a policy of insurance, where a beneficiary with an insurable interest, is other than the person insured. This represents the amount set aside each year by the Company to the account of that particular policy. This is

done to provide a sinking fund, which will amount to the face of the policy and discharge the same at the end of the period of insurance. That end, is the probability of the death of the insured. This is calculated from the mortality tables, in view of the expectancy of life. That is to say, the period of his natural life, beginning with the inception of the insurance. The sums set aside from year to year for this purpose will ordinarily equal the amount for which the insurance policy is made. When the proceeds of the policy, by the designation of the insured, are to be paid to the wife, upon death of the insured, in view of this system of the insurance company, the wife, who is the beneficiary, has acquired a vested interest in this sinking fund, or reserve as it is termed by the Insurance Companies. Its sum total, constitutes the amount to be paid her in the event of her husband's death. If the Georgia Statute above cited
37 does not forbid it, her interest might have been divested by another designation. This, however, he did not make. The policy and all its values were hers at the time of bankruptcy. Her right is as strong as if the policy had been originally taken out in her name, with the reserved right to change the beneficiary, when no such change has been made. In such case, it can scarcely be contended that against such right, the creditors could have prevailed. The right is hers. Therefore, if the bankrupt in this case, should be compelled by the Court to withdraw this reserve, which has accumulated at this time, it will diminish the amount which will be paid to his widow at the date of his death. It therefore, would make the widow pay the trustee for the benefit of the husband's creditors. In other words, it would make her responsible pro tanto for her husband's debts, which is contrary to the policy of the State. Georgia Code #2993 again, the basic principle of life insurance is protection for those dependent upon the insured, primarily, his wife and children; and if his creditors; when his wife and children are designated as beneficiaries, because of bankruptcy, are to be permitted to deprive those who are otherwise helpless, of this protection, the main purpose of insurance would be frustrated. Of course, this principle will not apply where the policy is payable to his legal representative.

While it is true that the law of Georgia is not as explicit as the law of some of the States, for the protection of the widow, for the reasons above given, we think it is substantially effective to that end. And moreover, the Bankruptcy Court, is a Court of Equity, and the fact that the widow-to-be has a vested interest in the cash value of the policy, that is to say, the reserve, appeals strongly to the Court, particularly its duty as a Court of Chancery to protect the widow and the orphan. While the interest of the wife is, of course, contingent upon death as already stated, the withdrawal of the cash surrender value at the adjudication, would subtract the amount from the total of that interest. It might, indeed,
38 occasion the greatest hardship. The expectancy of the insured, for instance, might be thirty-seven years. He might have carried a policy for thirty-five or thirty-six years. The cash value of such a policy carried for so long would practically amount

nearly to its face value. Then should bankruptcy intervene, and the cash value be withdrawn, the purpose of his life extending over the period of a generation, to protect his wife and children by insurance, would be wholly defeated, for the remnant she would draw at his death would be of little value.

It follows that our conclusion is, that in so far as the ruling of the Referee if favorable to Mrs. Cohen, it is sustained, and in so far as it is unfavorable to her it is reversed. Decree will be taken accordingly.

Indorsement: Filed February 28th, 1916. Geo. F. White, Dep. Clerk.

In the District Court of the United States, Southern District of Georgia, Albany Division.

In re A. S. COHEN, Bankrupt.

In Bankruptcy.

Petition for review by bankrupt to review the decision of Referee on the petition of the Trustee to surrender two insurance policies in the Penn Mutual Life Insurance Company, Nos. 189847 and 189846 or pay the cash surrender value thereof.

The petition of the bankrupt for review in the above stated matter coming on regularly for a hearing at the December 1915, Term of the Court, and having been argued at the adjourned term thereof, on February 10th, 1916, and decision having been reserved on the same:

Now, therefore, after argument had, it is ordered and adjudged that the petition for review of the bankrupt be and the same
39 is hereby sustained; and it is further decreed that the order of the Referee be and the same is hereby reversed and the prayers of the Trustee in said case are hereby denied.

It is further ordered that the Trustee pay the costs of this petition for review.

Dated Macon, Ga., this March 3rd, 1916.

EMORY SPEER,
United States Judge.

Indorsement: Filed the Mar. 4, 1916. Geo. F. White, Deputy Clerk.

Recorded Book Bank, Min. page 259-59.

UNITED STATES OF AMERICA,
Southern District of Georgia, set:

I, Geo. F. White, Deputy Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the annexed and foregoing is a true and faithful copy of Petition of R. A. Malone, Trustee for surrender of Insurance Policies Numbers

189847—189846 issued by Penn Mututal Life Insurance Company on life of A. S. Cohen; Answer of A. S. Cohen; Amended Answer of A. S. Cohen, Order and Finding of R. J. Bacon, Referee; Petition of A. S. Cohen for Review; Report of R. J. Bacon, Referee on Petition for Review; Opinion of Court; and Order or Judgment of Court. In the matter of A. S. Cohen, Bankrupt. (37 pages of Typewriting) now remaining among the records of the said Court in my office:

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Albany, Georgia, this 18th day of March, in the year of our Lord one thousand, nine hundred and sixteen, and in the one hundred and 139th year of the Independence of the United States.

[SEAL.] GEO. F. WHITE,
Deputy Clerk District Court U. S.

40 [Indorsed on back:] U. S. District Court, Southern District of Georgia. In the Matter of A. S. Cohen, Bankrupt. Certified Copy—Petition of R. A. Malone, Trustee for surrender of Policies Nos. 189847 and 189846 issued by Penn Mutual Life Ins. Co. or the cash surrender value of same. Answer of A. S. Cohen. Amended Answer of A. S. Cohen. Order and Finding of Referee. Petition A. S. Cohen for Review. Report of Referee on Pet. Review. Opinion of the Court. Order and Judgment of Court.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of October 2nd, 1916.

No. 2939.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt,
versus
A. S. COHN, Bankrupt.

On this day this cause was called, and, after argument by Charles Akerman, Esq., and Sam S. Bennet, Esq., for petitioner, and I. J. Hofmayer, Esq., for respondent, was submitted to the Court.

Opinion of the Court.

Filed November 3d, 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

Numbers 2939 and 2940.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Petitioner,
vs.
A. S. COHN, Bankrupt, Respondent.

Petitions to Superintend and Revise from the District Court of the United States for the Southern District of Georgia.

Alexander Akerman, Charles Akerman and Sam S. Bennett, (John D. Pope and H. A. Peacock, on the brief), for petitioner.
George S. Jones and I. J. Hofmayer, (J. W. Kieve, W. W. Crews, and J. R. Pottle, on the brief), for respondent.

Before Pardee and Walker, Circuit Judges, and Grubb, District Judge.

WALKER, Circuit Judge:

At the time the petition in bankruptcy was filed and when the adjudication of bankruptcy was made there were in existence three policies of insurance on the bankrupt's life, two in the Penn Mutual Life Insurance Company, issued, respectively, in 1902 and 1905, and one in the New York Life Insurance Company, issued in 1902. At that time the bankrupt's wife was the beneficiary of each of the policies. By the terms of each of the policies the assured, the bankrupt, had the right, at any time during the continuance of the

policy, to change the beneficiary if the policy was not then assigned. By the terms of the Penn Mutual policies each of them had a present stated "loan or cash surrender value." The New York Life policy did not in terms provide for a "cash surrender value" during the twenty year accumulation period of the policy, but provided that stated "cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made." The petitions to superintend and revise bring into question decrees to the effect that the trustee in bankruptcy was not entitled to either of the policies or to be paid for cash value thereof.

In the District Court the view prevailed that a Georgia statute has such effect as to deprive the policies in question, after the bankrupt's wife was named as the beneficiary thereof, of the qualities of property to which the trustee in bankruptcy is entitled under section 70*a* of the Bankruptcy Act. The statute to which such effect is attributed is section 2498 of the Georgia Code of 1910, which reads as follows:

"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

We have the authority of the Supreme Court of Georgia for saying that the original enactment of this provision was but a statutory adoption of a proposition announced by the Supreme Court of Georgia in the case of Grenville v. Crawford, 13 Ga. 355, which was decided not long before that enactment was made. Smith v. Head, 75 Ga. 755, 758. In the case of Grenville v. Crawford it appeared that the insured in a life policy assigned it to his creditor accompanied by a stipulation that should he die before the secured debt was paid the assignee was to hold the policy as collateral security for the debt and turn over the balance to the insured's widow. The insured died, leaving the whole of the secured debt unpaid. The claim of his administrator asserted in the suit was that, "the intestate being entitled to redeem the policy by the payment of the secured debt during his lifetime, the same right descends to his legal representative," and that such representative was entitled to the surplus left after paying the secured debt. This contention was overruled, the court deciding that the insured's widow, and not his personal representative, was entitled to the residue of the amount collected on the policy left after the satisfaction of the secured debt. Nothing in the terms of the statute, especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to anyone other than the assured himself the power to defeat a direction by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him. The provision does not purport to make every such direction by the assured irrevocable by him, or to invalidate a stipulation in a life

policy giving the assured the right to change the beneficiary at any time during the continuance of the policy. The statute puts a direction by the assured to pay to his widow on the same footing as one to pay to his assignee. If a policy is assigned as security for a debt which the assured pays during his life certainly the statute is not to be given the effect of putting it out of the power of the assured to change the beneficiary upon the reassignment of the policy to him by the satisfied creditor. Nothing in its terms justifies giving it a different operation or effect in the case of a direction to pay to the widow. We are not of opinion that the provision quoted had the effect of conferring on the bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in policies by the terms of which the beneficiaries could be changed by the bankrupt at any time.

"The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. Bankruptcy Act, §70*a*.

Under the terms of this section if an existing policy on the life of the bankrupt confers upon him a property interest which prior to the filing of the petition he could by any means have transferred, the trustee is entitled to the policy or its surrender value. Under such policies as those here in question the interest of one who happens to be the beneficiary at the time the bankruptcy of the assured occurs is altogether contingent, being subject to be extinguished at any time by the assured, the bankrupt, exercising his right to realize on the policy or to continue it with a newly designated beneficiary, just as he may choose. The bankrupt's complete dominion over such a policy makes it his, and it passes with the rest of his property to his trustee, subject only to the right conferred on the bankrupt by the proviso to the section just quoted. In re Herr, 182 Fed. 716; In re Bonvillain, 232 Fed. 370; Collier on Bankruptcy (9th Ed.), 1014. It is not fairly open to question that, prior to the filing of the petition in bankruptcy, so far as the two Penn Mutual policies were concerned, means were available to the bankrupt of realizing on the policies himself or of transferring them to someone other than his wife.

The New York Life policy, equally with the Penn Mutual policies, is so completely under the dominion of the bankrupt as to

make it an asset which passed to his trustee. Does its failure expressly to provide for a present cash surrender value stand in the way of the bankrupt acquiring the right to hold, own and carry the policy by paying or securing to the trustee an ascertained sum of money? The failure of the policy to provide expressly for a present cash surrender value does not have this effect if in fact it has such a value by the concession or practice of the company issuing it. Hiscock v. Mertens, 205 U. S. 202. A main purpose of the proviso to section 70*a* was to enable the bankrupt to keep alive insurance on his life in force at the time of his bankruptcy by paying or securing to the trustee the amount in cash presently realizable by him from the insurer on his policy or policies. In the opinion in the case of Burlingham v. Crouse, 228 U. S. 459, 472, speaking of this provision, it was said:

"Congress undoubtedly had the nature of insurance contracts in mind in passing §70*a* with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance."

In view of the policy evidenced by the proviso it cannot be supposed that it was contemplated by the lawmakers that the privilege extended to the bankrupt of retaining his insurance by paying or securing to the trustee the present value which it has was to be withheld because of the fact that the amount of that value is obtainable by him from the insurer on the conditional surrender of his policy as the sole security for a loan of the amount instead of being obtainable from that source only upon an unconditional surrender of the policy. The concern of the trustee is to get the present value of the policy if it is one having such a value, and it seems altogether immaterial how the bankrupt acquires the amount necessary to be paid or secured by him, whether from the insurer or from some other source. The manifest purpose being to enable the bankrupt, when he has insurance on his life possessing a present value realiz-

able by him, to satisfy the trustee's claim in that regard by paying or securing to him the amount of that value, we are of opinion that a policy is to be regarded as one having a cash surrender value within the meaning of the statute when it stipulates for a present value made payable by the insurer on the conditional surrender of the policy as the sole security for a loan of the amount instead of on its unconditional surrender.

Our conclusions are that each of the policies mentioned passed to the trustee, but, as to each of them, subject to the right of the bankrupt to retain or reclaim it by paying or securing to the trustee the sum which the policy by its terms made available to him at the time of the bankruptcy as a cash asset. It follows that the petitions to superintend and revise should be granted and the decrees complained of reversed; and it is so ordered.

(Original Filed November 3d, 1916.)

Judgment.

Extract from the Minutes of November 3d, 1916.

No. 2939.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt,
versus
A. S. COHN, Bankrupt.

This cause came on to be heard on the petition of R. A. Malone, Trustee of A. S. Cohn, Bankrupt, to superintend and revise, in certain respects as therein stated, the proceedings of the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the said petition to superintend and revise the proceedings aforesaid, be, and the same is hereby granted; and that the decree of the said District Court in this cause be, and the same is hereby reversed;

It is further ordered, adjudged and decreed that the respondent, A. S. Cohn, Bankrupt, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate.

United States Circuit Court of Appeals, Fifth Circuit.

UNITED STATES OF AMERICA:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 41 to 48 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and pro-

ceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2939, wherein R. A. Malone, Trustee of A. S. Cohn, Bankrupt, is Petitioner, and A. S. Cohn, Bankrupt, is Respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 40 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of November, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals,
By GEORGE W. ROBERTSON,
Deputy Clerk.

50 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2939.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Petitioner,

versus

A. S. COHN, Bankrupt.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 26th day of April, A. D. 1917, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

In the Supreme Court of the United States, October Term, 1916.

No. 852.

"A. S. COHN, Petitioner,

v.

R. A. MALONE, Trustee of A. S. Cohn, Respondent.

Whereas, a petition for certiorari was filed by A. S. Cohn, petitioner, in the above stated case, to cause the United States Circuit Court of Appeals for the Fifth Circuit to certify to said Supreme Court for its review and determination the above cause, entitled in said Circuit Court of Appeals, R. A. Malone, Trustee of A. S. Cohn, Bankrupt, petitioner, v. A. S. Cohn, Bankrupt, respondent, Number 2939; and,

Whereas, a writ of certiorari was granted by said Supreme Court of the United States on April 16th, 1917, directed to said Circuit Court of Appeals, which writ commands that the record and proceedings in said cause be sent to said Supreme Court; and

Whereas, a certified transcript of the entire record in said case was filed by A. S. Cohn, petitioner, together with his petition for certiorari, and the same is now on file in said Supreme Court;

Now therefore, it is agreed between counsel for both sides that the certified transcript of record on file in the Supreme Court
51 of the United States, may and can be taken as return to said writ of certiorari in lieu of an additional certified transcript

being sent to the Supreme Court of the United States by said Circuit Court of Appeals.

In testimony whereof, witness the signatures of counsel for both sides this April the 24, 1917.

Signed:—

H. A. PEACOCK,
ALEXANDER AKERMAN,
JOHN D. POPE,
SAM S. BENNET,
Attorneys for R. A. Malone, Trustee of A. S. Cohn, Respondent.

Signed:—

GEO. S. JONES,
J. R. POTTLE,
J. W. KIEVE,
I. J. HOFMAYER,
Attorneys for A. S. Cohn, Petitioner."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 26th day of April, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

52 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which R. A. Malone, Trustee of A. S. Cohn, Bankrupt, is petitioner, and A. S. Cohn, Bankrupt, is respondent, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to superintend and revise from the District Court of the United States for the Southern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
53 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,682. Supreme Court of the United States, October Term, 1916. No. 852. A. S. Cohn, vs. R. A. Malone, Trustee, etc. Writ of Certiorari. Filed 26 day of April, 1917. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

54 [Endorsed:] 852/25682. No. 2939. United States Circuit Court of Appeals for the Fifth Circuit. R. A. Malone, Trustee of A. S. Cohn, Bankrupt, Petitioner, vs. A. S. Cohn, Bankrupt, Respondent. Writ of Certiorari and Return thereto.

55 [Endorsed:] File No. 25,682. Supreme Court U. S., October Term, 1916. Term No. 852. A. S. Cohn, Petitioner, vs. R. A. Malone, Trustee, etc. Writ of certiorari and return. Filed April 28, 1917.

In the United States Circuit Court of Appeals

FIFTH CIRCUIT.

Nos. 2989 and [redacted] 96

R. A. MALONE,

Trustee of A. S. Cohn, Bankrupt, Petitioner,

Versus

A. S. COHN, Respondent.

BRIEF OF COUNSEL FOR PETITIONER

ALEXANDER AKERMAN,
CHARLES ACKERMAN,
JOHN D. POPE,
SAM. E. BENNET,
W. A. PEACOCK,
Attorneys for Petitioner.

FILED
SEP 15 1916

In the United States Circuit Court of Appeals

FIFTH CIRCUIT.

Nos. 2939 and 2940.

R. A. MALONE,
Trustee of A. S. Cohn, Bankrupt, Petitioner.

Versus

A. S. COHN, Respondent.

Petitions to Superintend and Revise From the District Court of the United States for the Southern District of Georgia.

Brief for R. A. Malone, Trustee, Petitioner.

STATEMENT OF THE CASE.

The questions presented in these two petitions to superintend and revise are very similar and will be treated in one brief.

The District Judge held that certain insurance policies held by the bankrupt, and having cash surrender values, did not even to the extent of said cash surrender values, pass to the Trustee in Bankruptcy, because the bankrupt had, for the time being, named his wife as the beneficiary in said policies,—and this, too, notwithstanding the fact that said bankrupt had in said policies carefully reserved to himself the absolute right to change the beneficiary from time to time as he pleased,—in other words, had reserved to himself

the absolute right to name himself as the beneficiary and thus could now collect for himself that full cash surrender value. We insist that that ruling was error, and on this issue we invoke the judgment of this Court.

SPECIFICATION OF ERRORS IN CASE NO. 2939 (RECORD, P. 2)

(a) Because said order is contrary to law.

(b) Because said order of the Referee was proper and legal and should not have been set aside.

(c) Because the pleadings showed that the Trustee was entitled to said policies of insurance, or the cash surrender values thereof.

(d) Because it appeared from the record that the insurance company had not assented to any direction of the insured that said policies should be made payable to his wife, and therefore said policies and the cash surrender values thereof passed to the Trustee, and are a part of the estate in bankruptcy.

SPECIFICATION OF ERRORS IN CASE NO. 2940 (RECORD, PP. 2 and 3)

(a) Because said orders are contrary to law.

(b) Because the record and undisputed facts before the Referee and the Judge showed that said policy of insurance was the property of the bankrupt, which could have been transferred, and which might have been reached by legal process against him, and that it had a cash surrender value, and title to the same was vested in the said Trustee.

(c) Because even though it was true that the bene-

ficiary in said policy had been changed so as to make the same payable to the wife of said bankrupt, still said policy was the property of said bankrupt, and property which he could have transferred for the reason that said policy showed on its face that the insured might at any time during the continuance of said policy change the beneficiary and said provision of said policy being still of force, said insured had complete control over and ownership of said policy.

(d) Because even if said policy was made for the time being payable to the wife of the insured, he having still the right to change the beneficiary therein to any other person, he might choose, the said policy was not exempt from the payment of the debts of the insured under the laws of Georgia, there being no law in Georgia exempting insurance policies from the property of debtors, subject to the payment of their debts, and there being no other law, State or National, exempting said policy.

BRIEF OF THE ARGUMENT.

The Bankrupt Was Owner of the Policies.

If these policies had been made payable to the wife absolutely,—if the bankrupt had not reserved to himself the right to control them by changing the beneficiary at his own pleasure and without her consent,—then the policies might have been the property of the wife, and might not have vested in the Trustee. But inasmuch as this Bankrupt did reserve to himself the complete control over these policies,—and thus had the right, at the time he became a bankrupt (and still has it) to name himself as the beneficiary and thus collect

their cash surrender value himself,—and also the right to name as the beneficiary any one else in the world to whom he might choose to sell or give said policies, —all without the consent of his wife,—it necessarily follows that these policies are the property of the bankrupt,—are property which the bankrupt "could by any means have transferred," as mentioned in §70-a (5) of the Bankruptcy Act, and therefore under said section they to the extent of their cash surrender value which can be realized by the said bankrupt or the Trustee "vested by operation of law in the Trustee," unless there is some Georgia law exempting such insurance policies from liability for the debts of the insured.

Burlingham vs. Crouse, 228 U. S. 459, head note 3, and 472 bottom and 473 middle.
Holden vs. Stratton, 198 U. S. 202, 213 middle.
Re: Coleman (C. C. A.), 136 Fed., 818.
Re: White, 174 Fed., 333.
Re: Bonvillain, 232 Fed., 370.
Re: Dolan, 182 Fed., 949.
Re: Orear (C. C. A.), 178 Fed., 632.
Re: Draper, 211 Fed., 230.
Re: Churchill, 198 Fed., 711.
Re: Herr, 182 Fed., 716.
Re: Hettling, 175 Fed., 65.
Re: Diack, 100 Fed., 770.

In practically all of these cases the policies were (as are those in the case at bar) contingently, but not absolutely or irrevocably, payable to the wife of the bankrupt (or some one else other than the bankrupt), but also provided that the bankrupt (insured) could change the beneficiary, without the consent of any

one; and practically all of these decisions were based on the ground that the right reserved in the bankrupt to change the beneficiary, necessarily gave the bankrupt the power of realizing for himself the cash surrender value (either directly or by his transferring the policy to any one to whom he may choose to sell or give it) and therefore necessarily constituted such cash surrender value "property" which the bankrupt could "by any means have transferred."

As a matter of fact, it is logically unthinkable that the bankrupt could have the right to transfer the beneficial interest in the policy to any one whom he might choose,—could sell it, give it away, barter it off, or dispose of it in any way in the world which he might choose, and without the consent of any person in the world,—and at the same time not be the owner of the policy! And the bankruptcy law does not even require that the bankrupt be the technical owner of it, in order for it to pass to the Trustee! For it will pass if the bankrupt could "by any means have transferred it."

So the cash surrender values of these policies in the case at bar did undoubtedly pass to the Trustee, unless there was some Georgia law exempting them from liability for the debts of the insured bankrupt.

There is no Georgia Law Exempting From Liability For the Debts of the Insured the Cash Value of Life Insurance Policies Held by Him.

Although there are numerous matters discussed by our opponents and by the opinion of the trial judge, we submit that there is really only one question in this

case, and that is, Whether §2498 of the Georgia Code constitutes an exemption statute, exempting from liability for the debts of the insured the cash value of life insurance policies held by him. Our opponents contend that it is, and the trial judge seems, in his opinion, to have so held. We insist most confidently that the contrary is true and that both the history and the verbiage of that code section show that it has an altogether different purpose and meaning, more fully set out below. The code section reads as follows:

> "The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."
> Georgia Code of 1910, Sec. 2498.

1. THE HISTORY OF GEORGIA CODE SECTION 2498: The Supreme Court of Georgia have expressly held (Smith vs. Heard, 75 Ga., 778) that this code section originated in an early decision of the Supreme Court of Georgia (Greenville vs. Martin, 13 Ga., 355, decided in 1853) and even our opponents and the Trial Judge admit it,—yet we submit that these latter have missed the true construction and meaning of that code section, largely because they have not read it in connection with that decision in which it originated. They contend that that code section is an exemption statute, and yet that decision, on which it is based and from which it originated, had no connection with the question of exemption! The real question decided and discussed in that case was,

Whether an administrator had a right to revoke or declare ineffective a contract in the nature of an executory gift of insurance money made by his intestate. The $3,000 life insurance policy involved in that case was assigned by the intestate to Governor Crawford as security for a $1,500 debt, and the intestate "directed" Governor Crawford to pay the surplus (over and above the Crawford debt) to his (the intestate's) widow. The administrator claimed that the intestate "being entitled to redeem the policy, by the payment of Crawford's debt, during his lifetime, that the same right descends to his legal representative." The Supreme Court of Georgia in that case ruled against this contention, saying that "it by no means follows that, because (the intestate) himself could, by the terms of the agreement, revoke the voluntary settlement made for the benefit of his wife, that the same right descended to his administrator." And the Court further said that the death of the intestate "put it out of the power of the administrator, or anybody else * * * to defeat her right." Almost this identical language is used in said code section, which says that when the assured has "directed" the money to be paid his wife * * * "no other person can defeat the same."

Thus it clearly appears that said code section (as well as said decision) instead of attempting to provide an exemption, merely lays down a rule of law on the question as to whether such an executory gift of insurance money (revokable by the insured in his lifetime) shall be held valid and binding in Georgia after the death of the insured. The principle was doubtless inserted in the first Georgia code (effective in 1863) for the very reason that the Supreme Court of Geor-

gia had recently ruled (McKenzie vs. Downing, 25 Ga., 669, decided in 1858) that the drawing of a check was not sufficient delivery to constitute a valid gift causa mortis,—and again (Evans vs. Lipscomb, 31 Ga., 71 (3), decided in 1860) that there must be a complete delivery of dominion, in order to constitute a good gift;—and doubtless the codifiers inserted that principle in the code, now embodied in said section 2498, in order to set at rest any question as to whether this particular kind of executory gift (of life insurance money) would still be held valid and binding, without any delivery, in spite of those two recent decisions of the Georgia Supreme Court.

2. THE VERBIAGE OF CODE SECTION 2498: Aside from its history, we submit that the wording of this code section also clearly shows that it is not an exemption statute, for the following reasons:

(a) NO WORD IN THAT CODE SECTION ABOUT DEBTS; We submit that said code section says nothing in the world about debts of the insured or any one else, and it is hardly possible that a statute exempting insurance policies from the debts of the insured, could have been in the mind of the law-making power adopting the Georgia Code, when debts are not even remotely hinted at anywhere in the code section, or in the context.

(b) THERE WOULD HARDLY BE AN "EXEMPTION" IN FAVOR OF A "PERSONAL REPRESENTATIVE" OR AN "ASSIGNEE": Said code section, as it now stands, protects the rights of the "personal representative" (who is a representative of the creditors of the insured, as well as his

heirs), — and also the rights of the insured's "assignee" (who is most often indeed a creditor himself, holding the policy as collateral security), — as fully and as completely as it protects the rights of the insured's "widow" or his "children." If the code section had only mentioned the widow and children, there might have been some slight basis for the contention that it was intended to protect the widow and children against debts,—whether it actually accomplished that purpose or not. But as the code now stands, it appears to be just as solicitous about protecting the rights of the "personal representative" and the rights of the "assignee" of the insured,—as it is about protecting the rights of the widow and children. Whoever heard of an exemption statute in favor of a "personal representative" or in favor of an "assignee"? The absurdity of that contention is shown by this question alone. The widow and children might be the objects of legislative bounty and concern,—but the "personal representative" and the "assignee" never!

(c) BESIDES, THIS CODE SECTION REFERS ONLY TO THE INSURANCE "MONEY,"—NOT TO THE "CASH VALUE" OF THE INSURANCE POLICY; We submit that, even if this code section were construed as an exemption statute,—it could not be construed to exempt anything other than the insurance "money" itself,—the money paid after the death of the insured,—and not the "cash surrender value." It says nothing in the world about the "cash surrender value" of the insurance policy. There is a vast distinction and difference between the "money" which is paid on an insurance policy AFTER the

death of an insured,—on the one hand,—and the "cash surrender value" of the insurance policy, on the other hand,—as shown by the proviso attached to section 70-a of the Bankruptcy Act, and also by many decisions construeing it:

Everett vs. Judson, 228 U. S., 474.
Andrews vs. Partridge, 228 U. S., 479, and others.

3. BESIDES, HERE THE INSURED HAS NOT ABSOLUTELY "DIRECTED" THE MONEY TO BE PAID TO HIS WIFE: We submit that the instruments copied in the record, by which the insured bankrupt named his wife as the beneficiary, or made so called "assignment" of policies to her,—construed in connection with the insurance policies themselves, and especially in connection with the reservation made by the insured bankrupt, of the right in him to change the beneficiary, or make new "assignments" of the policies to any person whom he might choose, and without the consent of his wife or any one else,—do not amount to a real, positive, and final "direction" by the insured that even the "money" arising from the insurance policies after his death, should be paid to his wife. For those instruments, when so construed, amount to an order which is only temporary in its nature,—standing for the time being only,—and therefore do not constitute such final or absolute "direction," as was contemplated by that code section. By those instruments the insured bankrupt made only a tentative settlement on his wife, — a sort of Indian gift,—a gift with a string tied to it,—so that the insured bankrupt could take it back whenever he

pleased! While we are not so sure of this position as we are of those mentioned above (and those above seem to settle the question in our favor, regardless of this parlicular position), yet it seems to us that the word "direct" and the word "direction" used in this code section should be construed to mean something more definite, and positive and final, than that embraced in these policies and the instruments attached thereto, designating the wife of the insured as the beneficiary. "Direct" means to order,—to instruct,—to command.

14 Cyc., 291, Note 17.
Calder vs. Curry, 17 R. I., 610.

A "direction" has the same force "as an order given a soldier, whose only answer is obedience."

Peeple vs. Guggenheimer, 59 N. Y. Sup, 913.

"'Direction" distinguished from "authorize."

Springarden vs. Wistar, 18 Pa. St., 195, 198.

We submit that the rather temporary, wavering and non-committal instruments embodied in this record, naming the wife as beneficiary for the time being only, and reserving to the insured the right to change the beneficiary at any time, constitute more nearly an "authorization" rather than a positive and final "direction."

It is true that in Smith vs. Head, 75 Ga., 755, the Supreme Court of Georgia held that a policy of life insurance "payable to the wife" became her property,

—but we have examined the original record in that case now of file in the Supreme Court of Georgia, and find that the policy there involved gave the insured no right whatever to change the beneficiary, and the policy had no cash surrender value. The insured there had no right to draw any benefits from the policy at all. Of course these all important facts make that case as widely different from the case at bar, as the east is from the west! These facts destroy any argument which could be built upon that decision by our opponents. The expression of the individual judge of the Georgia Court who wrote the opinion in that case, to the effect that the insured "made no change. No other person can," was wholly outside the record, for the reason that the record in that case showed that there was no way on earth or under Heaven by which the insured could have "made a change," as the policy gave him no control over it whatever!

Answers to Certain Expressions in the Opinion of the Trial Judge, Embodied in the Record.

We submit the following comments on the following quoted expression from the opinion of the trial judge, embodied in this record: 34

The trial judge says (p. ~~26~~) "It is essential to inquire, first, whether the bankrupt had title to the cash surrender value of the policies; second, whether, construed in pari materia with the Georgia Statute, Cohn (the bankrupt) had the power to transfer his interest to such cash values therein; again, whether they might have been levied upon and sold under judicial process; and again, whether there was, in the language

of the Act, "a cash surrender value, payable to himself, his estate or personal representative."

We answer that the bankrupt insured did have title to the cash surrender value of the policies (1) because of his unlimited power to change the beneficiary, including the power to name himself as beneficiary, and (2) besides it is not necessary, under section 70-a of the Bankruptcy Act, that the strict legal title be in the bankrupt,—but it is sufficient if he could "by any means have transferred" it,—and (3) besides, the decisions first cited by us above, show that said cash surrender value passed to the trustee.

We answer also that the insured could have transferred his interest in said cash surrender value, by changing the beneficiary, and even without changing the beneficiary,—and the Georgia Statute, as shown above, does not prevent such transfer, but said Georgia statute, on the contrary, authorizes and validates it, even though it is in the nature of an executory gift which would be invalid without delivery of the money in the lifetime of the insured, but for that statute.

We answer also that, as to whether there was "a cash surrender value payable to himself (the insured bankrupt), his estate or personal representative"—that (1) the policies show that the insured bankrupt could realize that cash surrender value at any time, and (2) it is a total misconstruction of the proviso in section 70-a of the Bankruptcy Act, to imply that said proviso means that the "cash surrender value" must be "payable to himself, his estate or personal representative"—(for no one ever heard of a "cash surrender value" being payable to an "estate" or a "personal representative," for the reason that the "cash surren-

der value" of a policy is always merged into its full face value at the death of the insured, and not until his death can a man have an "estate" or a "personal representative")—but what said proviso in section 70-a of the Bankruptcy Act contemplates, and says, is that "when the bankrupt shall have any insurance policy * * * payable to himself, his estate, or personal representatives" and (3) besides all this, said proviso does not say that no other insurance policies shall pass to the trustee, other than those payable to the bankrupt "himself, his estate or personal representative" (as shown by the decisions first cited above),—but said proviso merely provides how that particular kind of policy (payable to the bankrupt, "himself, his estate, or personal representatives") may be redeemed as to all but the cash surrender value thereof.

We say that if we are right as to any one of the above answers, then the judgment of the court below must be wrong. The trial judge says "we think that all of these questions must be answered in the negative." If any one of them should be answered in the affirmative, the judgment should be reversed.

34

The trial judge, in the opinion printed in the record (p. 26 of record) says that the provisions of the Bankruptcy law "can have no relation to a policy of which he (the insured bankrupt) has made his wife beneficiary, and where the State law protects her beneficial interest. Here, the legal title was in the wife."

We answer (1) that the mere fact that the wife is, for the time being, the beneficiary (the insured having the right to change the beneficiary at any time)

would not prevent the provisions of the Bankruptcy law from applying, unless it be true that "the State law protects her beneficial interest" and we have shown above that the State law has no such purpose or effect, and is not an exemption statute at all. (2) And we insist that even if the legal title to the policies were in the wife, the cash surrender value was entirely in the control of the bankrupt and could have been transferred, or realized by him at any moment,—and (3) besides, we insist that the legal title to the policies was not in the wife, as shown above.

The trial judge, in the opinion printed in the record (p. 27 of printed record) says that these precedents (cited and showing that the cash surrender value of the policies passed to the trustee) "relate to the proceeds of the policy where the bankrupt or his legal representatives was the beneficiary, or that the decisions were rendered in States where no such conclusive protection was thrown around the designation of the widow and children as beneficiaries as that afforded by the law of Georgia."

We answer (1) that the policies in the case at bar were payable to the insured bankrupt, or his estate or personal representative, in case the wife did not survive him,—were identical in form with the major part of the policies mentioned in the citations first given by us above, showing that the cash surrender value did pass to the trustee;—and (2) that there is no "such conclusive protection" thrown around the designation of the widow and children as beneficiaries, by the Georgia law,—as we have already shown in this brief above,—and, as we have already shown, if there is any

such "conclusive protection" thrown around the designation of the widow and children as beneficiaries,—then the same "conclusive protection" is thrown around the designation of the insured's "personal representatives" or his "assignees" as the beneficiaries,—for it is the same protection,—given by the same code section. We insist, as shown above, that said code section is not for the purpose of affording any "protection" of anybody against debts,—but is merely for the purpose of validating an executory gift of insurance money, which would otherwise be invalid for the want of delivery during the lifetime of the insured.

35 The trial judge, in his opinion printed in the record (p. ~~27~~ of the printed record), says that "reliance is placed by the trustee upon the obiter of Chief Justice Lumpkin, in Greenville vs. Crawford, 13 Ga., 355."

We answer that we place no reliance upon that case, except to show the origin and meaning of code section 2498, which is relied upon by our opponents as an exemption statute. It is true that, in the opinion in that case, Judge Lumpkin strongly intimated that a creditor might reach even the insurance "money,"—that is, the money paid on the insurance policy after the death of the insured. We do not contend that such is the law of Georgia. We are not litigating here over the insurance "money." But we do insist that, under the law of Georgia as it now stands, where the insured reserves the right to change the beneficiary, and thus has complete control of the policy,—that in such a case, the creditors of the insured could reach the "cash surrender value" of such policy during his lifetime,—although they might not be able to reach the

insurance "money," paid on the insurance policy, after the death of the insured.

The trial judge, in his opinion (p. 36 ~~28~~ of the printed record) says "we therefore conclude that in Georgia, the language, 'no other person can defeat' imports that the trustee in bankruptcy cannot defeat."

We answer (1) that the expression "no other person can defeat" applies, as shown by code section 2498, to the insurance "money,"—that is, the money paid on the policy after the death of the insured,—and not to the "cash surrender value" which is in complete control of the insured during his lifetime; and (2) we have shown above that said code section is not an exemption statute, but only a rule of construction, to validate an executory gift which might be held otherwise, invalid, because of the want of any delivery.

The trial judge, in his opinion (p. 36 ~~28~~ of the printed record) says that the wife "has acquired a vested interest in this sinking fund, or reserve as it is termed by the insurance companies. Its sum total, constitutes the amount to be paid her in the event of her husband's death," and then argues that to take the cash surrender value now would deplete or lessen the amount coming to the wife.

We answer (1) that the wife's interest was not "vested" for the reason that the insured bankrupt, whose money paid for the insurance policies, expressly reserved to himself complete control over the policies, and a right to change the beneficiary, without the wife's consent, and (2) even if the trustee's taking of the "cash surrender value" should lessen the amount

that would be coming to the widow at the husband's death,—it would none the less be simply taking property that belonged to and was controlled by the bankrupt, and which should be applied to his debts. The bankrupt himself could realize this cash surrender value to-morrow. As for that matter, if the Bankruptcy Court is to have such tender regard for the widow of the bankrupt, perhaps it had better leave all of the property of the bankrupt in his hands, and give the creditors nothing,—for thereby the widow would have probably a larger amount "in the event of her husband's death."

Respectfully submitted,

ALEXANDER AKERMAN, Macon, Ga.
CHARLES AKERMAN, Macon, Ga.
JOHN D. POPE, Albany, Ga.
SAM. S. BENNET, Albany, Ga.
H. A. PEACOCK, Albany, Ga.

Attorneys for R. A. Malone, Trustee, Petitioner.

Office Supreme Court, U. S.
FILED
JAN 6 1917
JAMES D. MAHER
CLERK

14.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 852 [redacted] 96

A. S. COHN, PETITIONER,

vs.

R. A. MALONE, TRUSTEE OF A. S. COHN, BANKRUPT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

GEORGE S. JONES,
J. W. KIEVE,
J. R. POTTLE,
I. J. HOFMAYER,
Counsel for Petitioner.

(25,682)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 852.

A. S. COHN, PETITIONER,

vs.

R. A. MALONE, TRUSTEE OF A. S. COHN, BANKRUPT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI,

Requiring the Circuit Court of Appeals for the Fifth Circuit to Certify to the Supreme Court for its Revision and Determination the Petition for Review in Bankruptcy Taken by said R. A. Malone, Trustee as Aforesaid, Respondent, vs. A. S. Cohn, Bankrupt, Petitioner, Lately Pending in said Circuit Court of Appeals.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of A. S. Cohn respectfully shows:

Nature of the Case.

First. The policies of insurance involved in this case, issued by the Penn Mutual Life Insurance Company, were

originally taken out on July 25, 1901. They are dated April 1, 1902, and February 6, 1905, the two policies evidently having been changed from what is known as ordinary or convertible term policies. One of them was payable to the insured's executors, administrators, etc., and the other to his sisters and brothers, or, in the event of their death before him, then to his executors, administrators, etc.

The policy payable originally to his brothers and sisters gave full power, while the policy was in force and not previously assigned, to change the present beneficiary or beneficiaries, such change to be made by instrument in writing, and to take effect only upon its endorsement upon the policy by the company at its home office.

The policy payable originally to his estate did not contain this provision, but provided for an assignment of the policy by a provision that such assignment should be attached to the policy and a duplicate furnished to the company. Subsequently, on July 15, 1910, both of these policies were assigned to the wife of the insured in the following language:

> "For value received, I hereby sell, assign, transfer and set over all right, title, and interest whatsoever of, in and to the said policies"

to the wife, if she outlives the insured, otherwise to his estate, with full power to the insured to change the beneficiary or surrender the policy to said company at any time, this to be done by instrument in writing under his hand and seal, to be recorded at the home office of the company.

At the date of the adjudication in bankruptcy of the insured in 1915 one of these policies had a cash surrender value of $644.12 and the other of $322.06. The "absolute assignments" (as they were designated by the company), hereinbefore referred to, were furnished to the insured by the company upon his application to make his wife beneficiary, and were the usual forms used by the company in accomplishing such purpose, one copy being recorded in

the home office of the company and an exact duplicate being attached to the policy.

At the time of the adjudication in bankruptcy of the insured in 1915 the wife was, and still is, living and was the sole beneficiary named in the policies, or, more correctly speaking, was the assignee of the policies under the form used by the company.

Proceedings Before Referee.

Second. That on February 1, 1915, respondent herein, as the trustee in bankruptcy, presented his petition to the referee in bankruptcy for the Southern District of Georgia, before whom said bankruptcy case was pending, praying that the bankrupt, A. S. Cohn, this petitioner, be required to surrender to said trustee two certain insurance policies Nos. 189,847 and 189,846, issued by the Penn Mutual Life Insurance Company on the life of said bankrupt, or pay to said trustee the cash surrender value of said policies, amounting to $966.18.

Third. That said bankrupt appeared in response to said petition and filed his answer and amended answer, and the matter was submitted to the referee upon the petition and answer as amended, the parties agreeing that these pleadings stated the facts of the case, and the only issue to be decided was the conclusion of law to be drawn from the facts pleaded, and the said referee, on October 28, 1915, passed an order requiring the bankrupt to pay to the trustee the cash surrender value of said policies, or to surrender the said policies to the trustee, to the end that he might collect the cash surrender values of the same. The referee held, *dubitante,* that a statute of Georgia, hereinafter referred to, exempted such policies, but as the insurance company had not assented to the wife being made beneficiary, the policy would not be exempt under the provisions of the Georgia statute. Said statute of Georgia (Code of 1910, § 2498) reads as follows:

> "The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

Action in District Court and Circuit Court of Appeals.

Fourth. That the bankrupt filed his petition to have said order of the referee reviewed by the district judge, and said order and proceedings were certified to the district judge, as was usual in such cases, and on the third day of March, 1916, Honorable Emory Speer, district judge, passed an order sustaining said petition for review and decreed that said order of the referee be reversed, and that the prayers of the trustee in said case be denied, holding in substance that the policies in question were not an asset for the trustee; that the Georgia statute protected same from being subjected by the trustee, and that the mere fact that the policy gave to the insured the right to change the beneficiary did not destroy the rights of the beneficiary which otherwise existed, where such election to change had not been made by the bankrupt on the date of his adjudication in bankruptcy.

Fifth. That the trustee in bankruptcy thereupon duly filed with the Circuit Court of Appeals for the Fifth Circuit his petition to superintend and revise the judgment of the District Court of the United States for the Southern District of Georgia, hereinbefore referred to, and after argument thereon the Circuit Court of Appeals of the Fifth Circuit rendered a decision on November 3, 1916, holding in substance that the policies in question were an asset of the trustee in bankruptcy, subject to the right of the bankrupt under section 70-*a* (5) of the bankrupt act to pay to the trustee the cash surrender value thereof, and that the Georgia statute hereinbefore referred to did not exempt such policies from the

claims of the trustee in bankruptcy, because the right was reserved in the policies by the insured to change the beneficiary.

Important Questions Involved, Affecting Holders and Beneficiaries of Life Insurance Policies and Companies Themselves.

Sixth. The questions involved are as follows:

(*a*) Whether or not an ordinary policy of life insurance on the twenty-year payment plan, insuring the life of a bankrupt, in which the wife of the bankrupt is named as the beneficiary, or under the terms of which the bankrupt has assigned and transferred all of his interest in said policy to his wife, with power reserved in the bankrupt to change the beneficiary named therein, which policy has a cash surrender value at the date of the adjudication of the bankrupt, is such an asset under section 70-*a* of the bankruptcy act that the same belongs to the trustee in bankruptcy, with the right in the bankrupt to pay to the trustee under section 70-*a* (5) of the bankruptcy act, the amount of the cash surrender value thereof and retain the policy; or whether or not under the circumstances stated, the same belongs to the wife, the beneficiary named in, or the assignee of, the policy.

(*b*) Whether or not a State statute of exemption, which would ordinarily have the effect of preventing the creditors from subjecting the proceeds of an ordinary policy of life insurance, is ineffective, because the right is reserved in the policy to the insured to change the beneficiary, although such right at the date of the adjudication in bankruptcy had not been exercised, and the policy under its terms had been assigned to the wife of the bankrupt, who was the beneficiary thereof at the date of the adjudication of bankruptcy.

Conflicts Between Various Federal Courts.

Seventh. That this cause, involving as it does, questions of far-reaching importance to mercantile and business interests, is one in which the decisions of the different circuit courts of appeal are at variance, as well as those of the different district courts, and an authoritative determination of these questions is necessary in order to settle the many conflicting opinions and thereby obtain a uniform construction and administration of the act of Congress in relation to bankruptcy throughout the United States.

The gist of the opinion of the Circuit Court of Appeals of the Fifth Circuit in the case at bar is found in the two following quotations:

> "Nothing in the terms of the statute (Georgia Code, § 2498), especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to any one other than the insured himself the power to defeat a direction by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him.
>
> "Under such policies as those here in question the interest of one who happens to be the beneficiary at the time the bankruptcy of the insured occurs, is altogether contingent, being subject to be extinguished at any time by the insured, the bankrupt, exercising his right to realize on the policy, or to continue it with a newly designated beneficiary, just as he may choose. The bankrupt's complete dominion over such a policy makes it his, and it passed with the rest of his property to his trustee, subject only to the right conferred on the bankrupt by the proviso to the section just quoted" (§ 70*a* of the Bankruptcy Act).

The Circuit Court of Appeals for the Eighth Circuit, *in re* Orear, 189 Federal, 888, discussing policies similar

to those involved in the case at bar, and a statute of Missouri which provided that every policy of insurance "expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit independently of the creditors * * * of the husband," holds as follows:

> "The primary purpose of such policies is still to insure against death and usually for the benefit of those dependent upon the insured, and when a modern policy is made, as in this case, payable upon the death of the insured to his wife by name as beneficiary, the fact that the insured may have the right to change the beneficiary or enjoy certain collateral rights in his lifetime does not make it any the less a policy of insurance made by an insurance company expressed to be for the benefit of the wife of the insured within the meaning of the statute in question, and to hold otherwise would be to hold that the Legislature of Missouri enacted a statute with reference to a kind of policy no longer used."

The court in the same opinion further holds:

> "The trustee is seeking to obtain property the title to which he never took. This is not an ordinary claim of exemption. The trustee, it is true, is seeking to obtain exempt property; but the trouble with his claim is that he has no title to the property he seeks to hold. That of course ends his contention. The property is not only exempt, but never passed to him and is not his."

The Circuit Court of Appeals of the Second Circuit, *in re* White, 174 Federal, 333, in passing on the rights of the parties as to a "trust certificate" issued by the Penn Mutual Life Insurance Company, came to the same conclusion as the Circuit Court of Appeals for the Fifth Circuit, holding that the New York statute, which was somewhat similar in its purposes and effect to the Georgia statute, was not applicable, and that the policy was an asset of the trustee,

reversing the judgment of the district court, which held to the contrary.

The opinion was not unanimous, Coxe, Jr., having dissented.

Subsequently, where a trustee in bankruptcy made an effort to require the insured to turn over to him the loan value of a policy which had been issued for the benefit of his wife, the court uses the following language, which is peculiarly applicable in the case at bar and in conflict with the principles laid down by the Circuit Court of Appeals of the Fifth Circuit:

> "Twelve years ago the bankrupt took out this policy for the benefit of his wife, so as to secure to her $3,000 in the event of his death. This was a laudable and proper thing to do; public policy encourages the making of such provisions for an uncertain future. The policy contains a clause authorizing the insured to change his beneficiary, a perfectly proper clause, she might pre-decease him, or desert him, or become unfaithful. There is nothing to suggest any such reason for making a change. On the contrary the presumption is that now, when he is a bankrupt and his death in the near future would, except for this insurance possibly leave her in poverty, he would not voluntarily cancel his designation of her as the beneficiary. It cannot be assumed that, of his own motion, he would take away from her the small sum which the beneficial system of life insurance and his own savings during twelve years have made it possible to secure to her as a last resource should he die and leave nothing behind him. The proposition that he should be constrained, against his will by an order enforceable by imprisonment in the event of disobedience, to deprive his wife of her present interest in the policy, to make himself the beneficiary, to borrow two-thirds of the $3,000 from the company and turn it over to his creditors, and then to make her again the beneficiary of the remaining third seems contrary to public policy and to good morals."
>
> *In re* L. Hammel & Company, 221 Fed., 56.

This language was later quoted approvingly by the Circuit Court of Appeals of the Second Circuit *in re* Lewis Arkin *et al.*, 231 Fed., 947.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Scheld, 104 Federal, 870, referring to section 70 of the bankruptcy act says as follows:

> "It will be seen that the clause of section 70 above quoted, does not include policies of insurance payable to the wife, children or other kin of the bankrupt, but is limited to policies, the proceeds of which are payable to the bankrupt himself, his estate or personal representatives."

The later decision of that court, *in re* Holden, 113 Federal, 143, is not in conflict with the principles announced in the Scheld case, because in the Holden case both the husband and wife, were adjudged bankrupts, and the court held the policies were assets of their respective estates, and were not protected by the Washington statute. That case was later reversed by this court on the ground that the Washington statute was an exemption statute, which protected the proceeds and avails of the policies from any claim by the trustee.

Holden *vs.* Stratton, 198 U. S., 202.

The decisions of the different district courts, most of which are cited in the opinions quoted from above, are likewise in conflict.

Eight. Petitioner files herewith his brief in support of his petition, and files as an exhibit hereto a certified transcript of the entire record in said cause, including all the proceedings in the Circuit Court of Appeals.

Wherefore, your petitioner prays that a *writ of certiorari* may be granted to cause said United States Circuit Court of Appeals for the Fifth Circuit to certify to this court, for its review and determination, petitioner's said cause therein enti-

tled R. A. Malone, Trustee of A. S. Cohn, bankrupt, petitioner, *vs.* A. S. Cohn, bankrupt, respondent, No. 2939.

A. S. COHEN, *Petitioner.*

GEO. S. JONES, *Macon, Ga.;*
J. W. KIEVE,
J. R. POTTLE,
I. J. HOFMAYER, *Albany, Ga.,*
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, A. S. Cohen, petitioner mentioned and described in the foregoing petition, being sworn, do say that the statements contained therein are true.

A. S. COHEN.

Sworn to and subscribed before me this 3d day of January, 1917.

[Seal of J. B. Lanier, NotaryPublic, Dougherty County, Ga.]

J. B. LANIER,
Notary Public, Dougherty County, Georgia.

BRIEF IN SUPPORT OF PETITION.

Code, Section 2498 of the Georgia Code of 1910, Protects These Policies from Any Claim of the Trustee.

The district court, we think, properly held that the policies in question were free from any claim of the trustee, for one reason, because of a Georgia statute, hereinbefore set out, which provides that where the insured has given direction for payment, "NO OTHER PERSON CAN DEFEAT THE SAME."

The exemption of policies of life insurance under the bankruptcy act of July 1, 1898, section 6, where they are exempted from execution by the State law, is not qualified by the proviso in section 70*a* of that act.

Holden *vs.* Stratton, 198 U. S., 202.

In the Holden case one of the policies was payable to the wife of the insured in the event of her surviving her husband, otherwise to his estate or assigns; and if the husband survived the designated period, he might surrender the policy and recover its full cash surrender value. The Washington statute provided: "That the proceeds or avails of all life insurance shall be exempt from all liability for any debt." This court held in that case that the Washington statute exempted the policies from any claim upon the part of the trustee. The purpose and effect of the Georgia statute are the same as the Washington statute quoted, and the Holden case would be controlling upon the case at bar, unless the mere fact that the insured reserved the right to change the beneficiary would change the ruling in that case.

History of Georgia Code Section 2498.

The principle in this code section evidently originated in a decision of the Georgia Supreme Court, Greenville *vs.* Crawford, 13 Ga., 355, decided in 1853. The language of

section 2498, however, is not the language of the head-note or any part of that decision. The first codification of this principle of law appears in the Georgia code of 1863 in section 2770 (adopted by legislative enactment on December 19, 1860), and in the identical language of section 2498 of the Code of 1910, and it has appeared in the identical language in every code of Georgia since it was first adopted. The constitution of Georgia of 1868 adopted all laws of force in the code of 1863, and the constitution of 1877 in like manner adopted this identical code section, as it appeared in the code previous to its adoption, and which was in the exact language of section 2498 of the code of 1910, which last code was adopted by a legislative enactment in language similar to the statutes adopting previous codes.

See article 12, section 1, paragraph 3, of the Constitution of Georgia of 1877; Civil Code of Georgia, section 6604.

Whatever may be said with reference to prior codes of Georgia, the code of 1895 and the code of 1910, both containing this section under consideration in identical language, were adopted by legislative enactment, and all of the sections therein contained have the *force and effect of a legislative enactment,* and this is true, even though a particular code section may have been based upon a codification of a Supreme Court decision, and not originally upon an enactment of the legislature. In other words, code section 2498, regardless of its original, is now of recognized force and effect in the language in which it appears as if expressed in a separate act of the legislature.

The Supreme Court of Georgia, in discussing another section of the code, uses the following language:

> "By an act of the General Assembly approved December 9, 1858, provision was made for the election of three commissioners 'to prepare for the people of Georgia a code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitution, the statutes of the State, the decisions of the

> Supreme Court, or the statutes of England, of force in this State.' The code prepared by the commissioners was adopted by an act of the General Assembly, approved December 19, 1860, but, by an act of 1861, it did not go into effect until January 1, 1863. That code contained a section (§ 2049) in the identical language of § 2287 of the code of 1895, and each of the intermediate codes has contained a section with similar provisions. Section 2741 of the Civil Code of 1910 is the same as § 2287 of the Civil Code of 1895. This section did not have its origin in a statute of this State. It appears for the first time in the code of 1863. It has, however, all the binding effect of an original act of the legislature, because of the adoption by the legislature of the codes wherein it appears."
>
> Wilensky *vs.* Central Ry. Co., 136 Ga., 890-891.
>
> See also Central of Ga. Ry. Co. *vs.* State, 104 Ga., 839.

This much has been said about the history of code section 2498, because of the language in the decision of the court below, indicating that the circumstances of the enactment of the statute might authorize the inference that the language of the statute means otherwise than what it states.

Code Section 2498 Construed by the Supreme Court of Georgia.

In Smith *vs.* Head, 75 Ga., 755, it was said on page 758, referring to the above-quoted code section:

> "This is too plain for argument. The assured directed the money paid to his wife. He made no change. No OTHER PERSON CAN."

There is nothing in the decision to indicate that the policy in question did not give the insured the right to change the beneficiary, and the court does not base its decision on that point.

The court further says, on page 755:

> "This policy, payable at her husband's death, is her property. The policy is payable to her then. It is as much hers as any other property can be, as any note payable in the future, or any fee in remainder, or any other property not to be used by her till a certain event transpires."

The code section, as it had existed for years, was therefore interpreted in that decision, and as so construed has been known to the public and to the law-making powers ever since. With this decision in mind and with the plain language of the Supreme Court of Georgia construing it as it appeared in the printed volumes of that court, there was and can be no necessity for legislative enactment to make plain what the Supreme Court of Georgia had already said was "TOO PLAIN FOR ARGUMENT."

In Bilbro *vs.* Jones, 102 Ga., 161, the Supreme Court of Georgia says, on page 162: "So long as the husband allowed the policy to stand with the wife as the named beneficiary, it was her property as against every one except the husband and the company," and we respectfully insist to the same effect in the case at bar. The husband had not made any change, but had transferred and assigned the policies to his wife, and having given that direction, the law of Georgia says, "NO OTHER PERSON CAN DEFEAT THE SAME."

The word "exemption," as used in the bankruptcy act, does not necessarily mean an exemption in the nature of a homestead; it has a broader meaning, which has been defined as "an immunity, a privilege." It may well mean any law, the purpose or effect of which is to prevent the subjection of property by creditors. It might well be concluded, as some of the courts have held, that the property is exempt from the trustee's claims, because it is property of the wife, or is property that never passed to the trustee and is not his.

In re Orear, 189 Fed., 888.

In re Russie, 96 Fed., 609.

Statutes of Exemption or for Benefit of Beneficiaries of Life Insurance Should be Liberally Construed and Given Effect by the Courts.

This statement of the law is recognized by decisions of the courts, both State and Federal, with practically judicial unanimity.

Roberts *vs.* Northwestern National Life Insurance Company, 143 Ga., 780.
11 R. C. L., 492.
In re Kane, 127 Fed., 552.
In re Arkin, 231 Fed., 947.
Holden *vs.* Stratton, 198 U. S., 214.
Eaton *vs.* Boston Safe, etc., Co., 240 U. S., 427.

The reasoning of this court in the case last cited appears to be destructive to the claims now presented by the trustee in bankruptcy.

Right to Change the Beneficiary Does Not Destroy the Purpose or Effect of Georgia Statute, nor Give Title of Policies to Trustee.

The trustee's principal claim of right to subject these policies is because the insured in the policies reserved the right to change the beneficiary. The decision of the court below is clearly based upon the fact that this right was reserved in the policy. We do not see how this fact would confer title to this property on the trustee, nor destroy the exemption benefits of the Georgia statute hereinbefore quoted.

While the insured had the right under the policies to change the beneficiary, HE HAD NOT DONE SO, and under the Georgia statute no one can do so for him. The insured had assigned all right, title, and interest in the policies to

the wife. *The legal title* was therefore in the wife. The insured might possess certain contingent, collateral rights, which exist practically in all modern policies, but these contingent privileges in themselves are not property.

Years before bankruptcy, the insured had *directed* that these policies should be paid to his wife, and such was the status at the date of his adjudication, at which time the rights of the parties are fixed. The legal title at that time being in the wife, by virtue of the direction given by the insured, under the plain comprehensive language of the Georgia statute, "NO OTHER PERSON CAN DEFEAT THE SAME."

These words, as said by the district court below, imported "that no creditor can defeat the same, nor can the trustee do so"; or, as more bluntly said by the Georgia Supreme Court, referring to these words in this section, "THIS IS TOO PLAIN FOR ARGUMENT."

In the case of Roberts *vs.* Northwestern National Life Insurance Company, 143 Ga., 780, the right was reserved by the insured to change the beneficiary. He gave a note for the first premium, which was not paid at maturity, and the insured surrendered the policy of insurance, and the policy was marked canceled by the company, and the note was surrendered to the insured. The insured subsequently died and the Supreme Court of Georgia held that, notwithstanding the policy gave to the insured the right to change the beneficiary, the wife had such a vested interest in the policy that the contract of insurance could not be terminated without her consent.

> "It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a chose in action."
>
> Steele *vs.* Gatlin, 115 Ga., 931, and cases cited.

All interest of the insured in the policies having been assigned to the wife, the legal title to the choses in action was therefore in the wife, subject to certain contingencies which might divest her of this legal title. The conditions

which might divest her of the title never having occurred, the legal title of these choses in action still remains in the wife. Such title being in the wife at the date of the adjudication, and the same not being leviable upon or capable of being sold under judicial process against the husband at that time, the same remains in her with a claim superior to any that the trustee may have under section 70 of the bankrupt act.

Statutes of Exemption Applicable to Ordinary Policies Protect the Beneficiaries, Although Right Reserved in the Insured to Change the Beneficiary.

The same sound public policy of Georgia, as expressed in section 2498 of its code, which encourages a man while solvent to provide for his wife and children by taking insurance, exists in practically every State of the Union.

The language of the statutes is not always identical, but the purpose and effect of all of them are the same.

The questions involved in the case at bar have arisen in other jurisdictions, and the trustee's claims as made in this case have generally been denied, and this is true in policies of insurance proper (like the ones under consideration), although the insured reserved the right to change the beneficiary.

In re Young (D. C. Ohio), 208 Fed., 373, the court, in construing policies like those under consideration and refusing to follow the Loveland case (D. C. Mass.), 102 Fed., 1005, as being "at variance with the great current of authority, and as supported by no other decision to which we have been cited," and after citing numerous cases to sustain its conclusion, says:

> "To grant the request of the trustee is to absolutely extinguish all interest of the beneficiary in these contracts; thus to wipe out all provision that the bankrupt has made for his wife and family. If that

may be done, then section 9398 General Code of Ohio and section 6 of the bankruptcy law are to no purpose."

The District Court of Minnesota, *in re* Johnson, 176 Fed., 591, holds as follows:

> "All rights of the trustee are fixed as of the date of adjudication, and the rights of the trustee in this proceeding were thus fixed and the beneficiary named, and this policy was for the wife, the insurance was therefore for her benefit, and in my opinion it should be held exempt from the bankrupt's creditors by virtue of section 1691 (of the laws of Minnesota)."
>
> Pulsifer *vs.* Hussey, 97 Me., 434; s. c., 54 Atl., 1076.
>
> Allen *vs.* Wisconsin Trust Co., 143 Wis., 381; s. c., 139 Am. St. Rep., 1107.
>
> *In re* Orear (8 C. C. A.), 189 Fed., 188.
>
> *In re* Whelpley (D. C. N. H.), 169 Fed., 1019.
>
> *In re* Boos (D. C. Pa.), 154 Fed., 494.
>
> *In re* Pfaffinger (D. C. Ky.), 164 Fed., 526.
>
> *In re* Jamison (D. C. Pa.), 222 Fed., 92.
>
> Frederick *vs.* Metropolitan Life Ins. Co. (D. C. Pa.), vol. 37, A. B. R. Adv. Sheets, page 737.

Some of the authorities cited immediately *supra* hold broadly that, where an ordinary policy of life insurance, like those in the case at bar, are payable to the wife of the insured, such a policy, or its cash surrender value, is not an asset of the trustee in bankruptcy, although the right is reserved by the insured to change the beneficiary, because the policy is not payable to the insured, his heirs, executors or administrators as required by section 70-*a* (5) of the bankruptcy act. Others of the cases cited arrive at a different conclusion, so far as the bankruptcy act itself is concerned, but hold that they are not an asset for the trustee, although the right is reserved in the policy to change the beneficiary, because they are exempt under the State statutes and protected by section 6 of the bankruptcy act, holding to this

effect, although the State statutes, like the Georgia statute, make no reference to the right of the insured, reserved in the policy, to change the beneficiary.

The court below cites two cases to support the opinion—*in re* Herr, 182 Fed., 716, and *in re* Bonvillian, 232 Fed., 370.

In the Herr case the policy was payable to the bankrupt, and only contingently to the wife, and this distinction is recognized by the other district courts in Pennsylvania.

In the Bonvillian case all of the debts scheduled had matured before the passage of the Louisiana statute, and the statute was held not to be retroactive; and in the recent case of Rosenberg *et al.*, the same district court decided in June, 1916, vol. 37, A. B. R. Adv. Sheets, p. 669, that the time the debts were scheluled by the bankrupt was the test of the exemption under the Louisiana statute, and the same district judge held that the Bonvillian case was not controlling where the debts were contracted after the passage of the Louisiana statute of exemption.

No Fraud Involved and Insured Not Insolvent When Premiums Paid.

In view of the foregoing authorities where an ordinary policy of life insurance is payable to the wife it does not appear to us that the policy or the cash surrender value thereof are such assets that the trustee can administer on the same, particularly where a statute of exemption of a State protects such policies from the claims of creditors.

The mere fact that the insured reserves the right to change the beneficiary, which right practically exists in every modern policy, ought not to confer upon the trustee property rights which otherwise would not exist. It is a privilege accorded solely to the insured. Where the legal title to the policies, therefore, is in the wife, as in the case at bar, the bankrupt ought not to be compelled to exercise a privilege, which prior

to bankruptcy he had not seen fit to exercise. This privilege of the insured does not destroy the property rights of the wife in the insurance policy, and especially is this so where a State statute does not expressly and clearly indicate an intention that such should be the case.

The attention of the court is particularly called to the decision of the district court below, filed as a part of the record in this case.

There is no contention in this case of any fraud upon the part of the insured, nor is there any claim that he was insolvent at the time the premiums were paid by him. The policies were taken out in 1901 or 1902, and five years before his bankruptcy the insured did the very laudable thing of making his wife the beneficiary of these policies, thus making provision for her, for whose support he is morally and legally chargeable. The policy of the law is to encourage parties to take out insurance for the benefit of their families. Such conduct is praiseworthy, and courts should be and are liberal in the construction of statutes and policies which would preserve to the widows and children the benefits of small savings made at a time when the insured are solvent.

Steele *vs.* Buell (C. C. A., 8th Cir.), 104 Fed., 968.
Bank *vs.* Hume, 128 U. S., 195.

Respectfully submitted,

GEO. S. JONES,
P. O., Macon, Ga.;
J. W. KIEVE,
J. R. POTTLE,
I. J. HOFMAYER,
P. O., Albany, Ga.;
Counsel for Petitioner.

Received on January 4, 1917, copy of the foregoing petition and brief and notice that the same will be submitted January 29, 1917. All other service and notice waived.

ALEXANDER AKERMAN,
CHAS. AKERMAN,
P. O., Macon, Ga.;
H. A. PEACOCK &
B. C. GARDNER,
J. D. POPE &
SAM'L BENNET,
P. O., Albany, Ga.,
Attorneys for R. A. Malone, Trustee of A. S. Cohn, Bankrupt, Respondent.

[Endorsed:] Supreme Court of the United States, October Term, 1916. No. —. A. S. Cohn, petitioner, *vs.* R. A. Malone, trustee of A. S. Cohn, bankrupt, respondent. Petition for Writ of Certiorari. George S. Jones, Macon, Ga.; J. W. Kieve, Albany, Ga.; J. R. Pottle, Albany, Ga.; I. J. Hofmayer, Albany, Ga., counsel for petitioner.

15.

Office Supreme Court, U. S.
FILED
JAN 28 1917
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

No. 652, October Term, 1916.

A. S. COHN, Petitioner,

vs.

R. A. MALONE, Trustee,
of A. S. COHN, Bankrupt,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

ALEXANDER AKERMAN,
CHARLES AKERMAN,
JOHN D. POPE,
SAM S. BENNET,
H. A. PEACOCK,
Attorneys for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

A. S. COHN, Petitioner,

vs.

R. A. MALONE, Trustee,
of A. S. COHN, Bankrupt,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

This is Not a Proper Case for the Grant of the Writ.

This Court will grant the writ of certiorari only when a question of gravity and importance is involved.

Ex-parte Woods, 143 U. S. 202,
36 Law Ed., 125.

No such question is involved in this case. The most that can be said for the petitioner is that he desires a construction of a Georgia Code Section.

The Conflict Between Courts is Rather Apparent Than Real.

In cases from States which have exemption statutes, the Courts have held that the Trustee is not entitled to the cash surrender value of a policy, but in cases from States which have no such statute, they have held that he is entitled to this cash surrender value. Moreover, almost all of the cases cited by counsel for the petitioner were decided before this Court delivered its opinions on these questions. By these decisions the Trustee's rights in connection with insurance policies have been settled, and therefore there is no cause for granting the writ in this case.

Burlingham vs. Crouse, 228 U. S. 459,
57 Law Ed. 920,
Holden vs. Stratton, 198 U. S. 202,
49 Law Ed. 1018.
Hiscock vs. Mertens, 205 U. S. 202,
51 Law Ed. 771,

"We think it was the purpose of Congress to pass to the Trustee that sum which was available to the bank-

rupt at the time of the bankruptcy as a cash asset; otherwise, to leave to the insured the benefit of his life insurance."

Burlingham vs. Crouse, 228 U. S. 459, 473.

The cash surrender value of these policies was "available to the bankrupt at the time of bankruptcy as a cash asset."

There is no Georgia Law Exempting From Liability For the Debts of the Insured the Cash Value of Life Insurance Policies Held by Him.

Properly construed, section 2498 of the Code of Georgia, merely gives the assured the right to direct to whom the insurance "money" shall be paid at his death, but does not exempt "the cash surrender value."

For a full discussion of this Code section, we refer the Court to the brief filed by the Trustee in the Court of Appeals, beginning on page 6, copies of which accompany this brief, and we respectfully ask the Court to consider that brief in connection with this one on this point, and the others involved in the case.

This Code section should be construed in connection with the decision of the Supreme Court of Georgia (Greenville vs. Crawford, 13 Ga. 355), from which it was codified.

"In the codification of the laws it is almost impossible to go into all the details of the different statutes codified. Where the Code sections are incomplete or

ambiguous, they must be construed in connection with the original Acts."

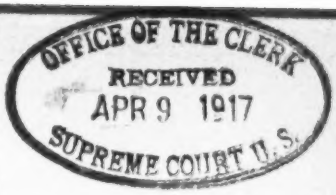
Bacon vs. Jones, 116 Ga. 136, 139,
Smith vs. Evans, 125 Ga. 109, 112.

We call especial attention to that part of the opinion of the Court of Appeals which deals with this Georgia Code section.

Respectfully submitted,

ALEXANDER AKERMAN,
CHARLES AKERMAN,
JOHN D. POPE,
SAM S. BENNET,
H. A. PEACOCK,
Attorneys for Respondent.

16



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 852 [redacted] 96

A. S. COHN, Petitioner,

vs.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Respondent.

MOTION FOR A REHEARING.

GEO. S. JONES,
J. R. POTTLE,
I. J. HOFMAYER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 852.

A. S. COHN, Petitioner,

vs.

R. A. MALONE, Trustee of A. S. Cohn, Bankrupt, Respondent.

MOTION FOR A REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that this honorable court will reconsider its action denying his application for a writ of certiorari and grant the same for the following reasons:

1. In addition to the conflicting opinions, referred to in his original petition, petitioner shows that the Circuit Court of Appeals of the Second Circuit in November, 1916, rendered an opinion, holding that the trustee in bankruptcy was *not* entitled to the policy or the cash surrender value thereof where the terms of the policy were identical with those of the policies

on the life of petitioner; the decision being diametrically opposed to the decision of the Circuit Court of Appeals of the Fifth Circuit in the case of petitioner.

Petitioner did not know of said decision of the Circuit Court of Appeals of the Second Circuit until it was printed in the Advance Sheets of the American Bankruptcy Reports, Vol. 38, p. 251 (Samuels v. Cohen), in February 1917, after petitioner's petition for writ of certiorari had been filed in this Court.

2. The majority and minority opinions in the case from the Second Circuit set forth succintly the different lines of argument growing out of the decision of this Court in Burlingham v. Crouse, 228 U. S. 459, where, however, the identical question now involved was not decided.

3. Petitioner is advised that on the same day that his petition for writ of certiorari was denied, this Court likewise denied a similar petition filed by the trustee in the case of Cohen v. Samuels, supra, thereby causing a continuance of the lack of uniform construction and administration of the Bankruptcy Act throughout the United States, referred to in his original petition.

4. The principles of law involved in this case are of great importance to the mercantile and business interests of the country, especially to the many policy-holders and insurance companies who on account of the two decisions herein referred to are at a loss to know what the law is.

5. In no way, except through a judgment of this Court, can the doubt which exists in the minds of the bar, or the differences which exist between the judges, be removed.

Petitioner hopes it will not be deemed improper for him to state, judging from the letters received by his counsel, that there are many cases now pending in the United States Courts

where the same question of law is involved. An authoritative decision by this Court, one way or the other, will set at rest for all time this much mooted question and result in uniform administration of the law in all parts of the country.

Petitioner realizes that this Honorable Court is now burdened with much important work and that ordinarily a motion for rehearing would not be in order, but hopes, in view of the facts stated above, particularly the direct conflict in the two recent decisions of the Second and Fifth Circuit Courts of Appeal, that the Court will feel he is justified in urging upon this Court a second time to grant his petition for a writ of certiorari.

Respectfully submitted,

GEO. S. JONES,

J. R. POTTLE,

I. J. HOFMAYER,

Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED
NOV 23 1918
JAMES D. MAHER,
CLERK.

17.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 358 96

A. S. COHN, PETITIONER,

vs.

R. A. MALONE, AS TRUSTEE IN BANKRUPTCY OF A. S. COHN, BANKRUPT, RESPONDENT.

BRIEF FOR PETITIONER.

J. R. POTTLE,
I. J. HOFMAYER,
J. W. KIEVE,
Attorneys for Petitioner and of Counsel.

INDEX

	Page
Statement of Case	3
Statement of Facts	4
Specification of Errors:	
Is life insurance policy of bankrupt, payable to wife, with cash surrender value, with right reserved to insured to change beneficiary asset of trustee under 70-a?	5
Under facts immediately above stated, does fact that insured reserved right to change beneficiary destroy exemption given by State laws?	5
Policies are exempt under Georgia Statute	6
Georgia Exemption Law–Code 1910, §2498	6
History of Georgia Code, §2498	8
Construction of §2498 by Georgia Supreme Court	9
Right to change Beneficiary does not destroy Georgia Statute	10
Same rule exists in other States	12
Decisions apparently contra Distinguished	17
Statutes of Exemption or in Favor Beneficiaries Liberally Construed	18
Conclusion	19

CASES CITED

Allen v. Central Wisconsin Co., 143 Wis. 381, 127 N. W. 1003	16
Arkin, In re 231 Fed. 947	18
Bankruptcy Act of 1898, §6	6
Bilbro v. Jones, 102 Ga. 161	10
Central of Ga. Ry. Co. v. State, 104 Ga. 839	9
Central National Bank v. Hume, 128 U. S. 203	18
Civil Code of Georgia, §2498	6
Civil Code of Georgia, §6604	8
Cohen v. Samuels, 245 U. S. 50	6

	Page
Eaton, Trustee, v. Boston Safe Co., 240 U. S. 427	18
Fetterman, In re, 39 Am. B. R. 834	16
Frederick v. Metropolitan Life Ins. Co., 235 Fed. 639	15
Greenville v. Crawford, 13 Ga. 355	8
Holden v. Stratton, 198 U. S. 202	7
Johnson, In re, 176 Fed. 591	14
Jones, In re, 41 Am. B. R. 467	16
Orear, In re, 189 Fed. 888	14
Pfaffinger, In re, 164 Fed. 526	16
Pulsifer v. Hussey, 97 Me. 434; 54 Atl. 1076	16
R. C. L. Vol. 11, p. 492	18
Roberts v. Northwestern Nat'l Life Ins. Co. 143 Ga. 780	11
Rosenberg, In re, 236 Fed. 812	17
Smith v. Head, 75 Ga. 758	9
Steele v. Gatlin, 115 Ga. 931	11
Taylor v. Williams, 139 Ga. 581	16
Tyler v. Treasurer (Mass.) 115 N. E. 300	14
Wilensky v. Central Ry. Co., 136 Ga. 890	9
Whelpley, In re, 169 Fed. 1019	16
Young, In re, 208 Fed. 373	13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 358.

A. S. COHN, PETITIONER,

vs.

R. A. MALONE, AS TRUSTEE IN BANKRUPTCY OF A. S. COHN, BANKRUPT, RESPONDENT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fifth Circuit which reversed an order of the District Court for the Southern District of Georgia, reversing an order of the Referee in Bankruptcy.

On February 1, 1915, a petition by the trustee in bankruptcy was presented to the referee in bankruptcy to require the bankrupt to deliver to the trustee two certain policies of insurance, issued by the Penn Mutual Life Insurance Company, on the life of the bankrupt, or pay to the trustee the cash surrender value as of the date of adjudication (p. 2). The bankrupt filed an answer, afterwards duly amended, and the parties having agreed that the pleadings stated the facts, the referee, on October 28, 1915, passed an order, granting the prayers of the trustee (p. 17).

Thereafter, the bankrupt filed a petition to review the said order of the referee, before the United States District Court for the Southern District of Georgia, which Court by its decree

on March 3, 1916, reversed the order of the said referee, holding that the policies in question were not an asset for the trustee and the same were exempt from any claim of the trustee on account of a Georgia statute, hereafter quoted (p. 23).

Thereafter the trustee in bankruptcy duly filed with the Circuit Court of Appeals of the Fifth Circuit his petition to superintend and revise the judgment of said District Court, which latter judgment was reversed by said Circuit Court of Appeals on November 3, 1916 (p. 29).

Thereafter this appeal was brought to this Court by the bankrupt by petition for certiorari which was duly granted (p. 36).

STATEMENT OF FACTS.

The two policies of insurance involved in this case, issued by the Penn Mutual Life Insurance Company, were originally taken out on July 25, 1901. They are dated April 1, 1902, and February 6, 1905; the two policies evidently having been changed from what is known as convertible term policies (p. 12, 14). One of them was payable to the insured's executors, administrators, etc., and the other to his sisters and brothers, or, in the event of their death before him, then to his executors, administrators, etc.

The policy, payable originally to his brothers and sisters, gave full power, while the policy was in force, and not previously assigned, to change the present beneficiary, such change to be made by instrument in writing, and to take effect only upon its endorsement upon the policy by the company at its home office (p. 14).

The policy, payable originally to his estate, did not contain this provision, but provided for an assignment of the policy by a provision that such assignment should be attached to the policy and a duplicate furnished to the company. Subsequently, on July 15, 1910, both of these policies were assigned *to the wife* of the insured in the following language:

"For value received, I hereby sell, assign, transfer and set over all right, title and interest whatsoever, of, in and to" the policies in question, to the wife of the insured, if she outlives the insured, otherwise to his estate, with full power to the in-

sured to change the beneficiary or surrender the policies to said company at any time, this to be done by instrument in writing under his hand and seal, to be recorded at the home office of the company (p. 15).

At the date of the adjudication in bankruptcy of the insured in 1915, one of these policies had a cash surrender value of $644.12 and the other of $322.06 (p. 18). The "absolute assignments" (as they were designated by the company), hereinbefore referred to, were furnished to the insured by the company upon his application to make his wife beneficiary, and were the usual forms used by the company in accomplishing such purpose, one copy being recorded in the home office of the company and an exact duplicate being attached to the policy (p. 10).

At the time of the adjudication in bankruptcy of the insured in 1915, the wife was, and still is, living, and was the sole beneficiary named in the policies, or, more correctly speaking, was the assignee of the policies under the form used by the company (p. 10).

Specification of Errors.

Petitioner hereby specifies the errors committed by the Circuit Court of Appeals, in holding that the trustee was entitled to the policies in question or the cash surrender value thereof, as follows:

(1) Under the facts upon which the case was tried, petitioner, who was adjudicated a bankrupt on January 12, 1915, had, prior thereto, at a time when he was solvent, to-wit: on July 15, 1910, transferred and assigned his interest in the policies to his wife and that said policies and the cash surrender value thereof were the property of his wife, and the same were not assets to be administered by the trustee in bankruptcy, notwithstanding the insured had reserved the right in the policies to change the beneficiary (p. 19).

(2) Because section 2498 of the Civil Code of Georgia provides as follows:

"The assured may direct the money to be paid to his personal representative or to his widow, or to his children, or to his as-

signee, and upon such direction given, and assented to by the insurer no other person can defeat the same. But the assignment is good without such assent;" and

Because, under the facts upon which the case was tried, petitioner (the insured) had directed any moneys to be paid under said policies to be paid to his wife, the beneficiary, which had been assented to by the insurer and petitioner had assigned the policies to his said wife and therefore the same were exempt under the law of Georgia from any debt of petitioner; and under section 6 of the Bankruptcy Act, all rights under this exemption statute of Georgia are recognized and preserved; and that this is true notwithstanding the insured reserved the right in the policies to change the beneficiary (p. 20).

I.

Policies Probably Asset Under §70-a of Bankruptcy Act.

We recognize that the recent decision of this Court, *Cohen v. Samuels*, 245 *U. S.* 50, probably disposes of the first point above referred to, in that the case cited holds that similar policies are an asset of the trustee under §70-a of the Bankruptcy Act. The fact that, in the case at bar, the policies were assigned to the *wife* in 1910, at a time when he was solvent, and the adjudication in bankruptcy of the insured did not occur until 1915, would be a complete answer to one of the reasons of the Court for its decision that an insurance policy of this kind "might be a refuge for fraud".

II.

Policies Are Exempt Under Georgia Statute.

The District Court, we think, properly held that the policies in question were free from any claim of the trustee, because of a Georgia statute, Code of 1910 §2498, which reads as follows:

"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or *to his assignee;* and upon such direction given, and assented to by the insurer, *no other person can defeat the same.* But the *assignment is good without such assent.*"

The exemption of policies of life insurance under the Bankruptcy Act of July 1, 1898, section 6, where they are exempted from execution by the State law, is not qualified by the proviso in section 70-a of that act.

Holden v. Stratton, 198 *U. S.*, 202.

In the Holden case one of the policies was payable to the wife of the insured in the event of her surviving her husband, otherwise to his estate or assigns; and if the husband survived the designated period, he might *surrender the policy* and recover its full cash surrender value (p. 203, 210). It does not appear from the printed report of the decision whether or not the insured had the right to change the beneficiary. The Washington statute provided "That the proceeds or avails of all life insurance shall be exempt from all liability for any debt." This Court held in that case that the Washington statute exempted the policies from any claims on the part of the trustee.

In the opinion of this Honorable Court in the recent case of *Cohen v. Samuels, supra*, it says: "The policies had a cash surrender value at the time Samuels was adjudicated a bankrupt which the companies were willing to pay to him, and in all of them he had the absolute right to change the beneficiaries."

From this and other language in the decision, it might be contended that if a policy is payable to a wife and the power to change a beneficiary is reserved, the policy passes to the trustee, notwithstanding any provision that may be made in a State law as to exemptions and that section 6 of the Bankruptcy Act (providing for exemptions) is not applicable to this particular class of property. We do not think that it was the intention of this Honorable Court so to hold, but notwithstanding the previous decision of this Court in the *Holden* case, *supra* (especially as in the latter case it does not clearly appear whether or not the insured had the right to change the beneficiary), it will take a clear-cut decision from this Honorable Court to set at rest the doubt among bench and bar on this subject.

III.

History of Georgia Code Section 2498.

The principle in this code section evidently originated in a decision of the Georgia Supreme Court, *Greenville v. Crawford*, 13 *Ga.*, 355, decided in 1853. The words in that decision, "there being no creditors" were clearly *obiter*, as the decision shows there were none.

Smith v. Head, 75 *Ga.*, 758.

The language of section 2498, however, is not the language of the head-note or any part of that decision. The first codification of this principle of law appears in the Georgia code of 1863 in section 2770 (adopted by legislative enactment on December 19, 1860), and in the identical language of section 2498 of the Code of 1910, and it has appeared in the identical language in every code of Georgia since it was first adopted. The Constitution of Georgia of 1868 adopted all laws of force in the code of 1863, and the Constitution of 1877 in like manner adopted this identical code section, as it appeared in the code previous to its adoption, and which was in the exact language of section 2498 of the code of 1910, which last code was adopted by a legislative enactment in language similar to the statutes adopting previous codes.

See article 12, section 1, paragraph 3, of the Constitution of Georgia of 1877; Civil Code of Georgia, section 6604.

Whatever may be said with reference to prior codes of Georgia, the code of 1895 and the code of 1910, both containing this section under consideration in identical language, were adopted by legislative enactment, and all of the sections therein contained have the force and effect of a legislative enactment, and this is true, even though a particular code section may have been based upon a codification of a Supreme Court decision, and not originally upon an enactment of the legislature. In other words, code section 2498, regardless of its origin, is now of recognized force and effect in the language in which it appears as if expressed in a separate act of the legislature.

The Supreme Court of Georgia, in discussing another section of the code, uses the following language:

"By an act of the General Assembly approved December 9, 1858, provision was made for the election of three commissioners 'to prepare for the people of Georgia a code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitution, the statutes of the State, the decisions of the Supreme Court, or the statutes of England, of force in this State.' The code prepared by the commissioners was adopted by an act of the General Assembly, approved December 19, 1860, but, by an act of 1861, it did not go into effect until January 1, 1863. That code contained a section (§2049) in the identical language of §2287 of the code of 1895, and each of the intermediate codes has contained a section with similar provisions. Section 2741 of the Civil Code of 1910 is the same as §2287 of the Civil Code of 1895. This section did not have its origin in a statute of this State. It appears for the first time in the code of 1863. It has, however, all the binding effect of an original act of the legislature, because of the adoption by the legislature of the codes wherein it appears."

Wilensky v. Central Ry. Co., 136 *Ga.* 890, 891.

See also *Central of Ga. Ry. Co. v. State*, 104 *Ga.* 839.

This much has been said about the history of code section 2498, because of the language in the decision of the Court below, indicating that the circumstances of the enactment of the statute might authorize the inference that the language of the statute means otherwise than what it states.

IV.

Code Section 2498 construed by the Supreme Court of Georgia.

In *Smith v. Head*, 75 Ga. 755, it was said on page 758, referring to the above-quoted code section:

"This is too plain for argument. The assured directed the money paid to his wife. He made no change. *No other person can.*"

There is nothing in the decision to indicate that the policy in question did not give the insured the right to change the beneficiary, and the court does not base its decision on that point.

The Court further says, on page 755:

> "This policy, payable at her husband's death, is her property. The policy is payable to her then. It is as much hers as any other property can be, as any note payable in the future, or any fee in remainder, or any other property not to be used by her till a certain event transpires."

The code section, as it had existed for years, was therefore interpreted in that decision, and as so construed has been known to the public and to the law-making powers ever since. With this decision in mind and with the plain language of the Supreme Court of Georgia construing it as it appeared in the printed volumes of that Court, there was and can be no necessity for legislative enactment to make plain what the Supreme Court of Georgia had already said was "*too plain for argument*".

In *Bilbro v. Jones*, 102 *Ga.* 161, the Supreme Court of Georgia says, on page 162: "So long as the husband allowed the policy to stand with the wife as the named beneficiary, it was her property as against everyone except the husband and the company," and we respectfully insist to the same effect in the case at bar. The husband had not made any change, but had transferred and assigned the policies to his wife, and having given that direction, the law of Georgia says, "*No other person can defeat the same*".

V.

Right to change the beneficiary does not destroy the purpose or effect of Georgia exemption statute.

The trustee's principal claim of right to subject these policies is because the insured in the policies reserved the right to change the beneficiary. The decision of the Court below is clearly based upon the fact that this right was reserved in the policy. We do not see how this fact would destroy the exemption benefits of the Georgia statute hereinbefore quoted.

While the insured had the right under the policies to change the beneficiary, *he had not done so*, and under the Georgia statute

no one can do so for him. The insured, long before bankruptcy and while solvent, had assigned all right, title, and interest in the policies to the wife. The legal title was therefore in the wife. The insured might possess certain contingent, collateral rights, which exist practically in all modern policies, but these contingent privileges, not exercised, would and could not of themselves defeat the benefits given by the Georgia exemption statute.

Years before bankruptcy, the insured had directed that these policies should be paid to his wife, and such was the status at the date of his adjudication, at which time the rights of the parties are fixed. The legal title at that time being in the wife, by virtue of the direction given by the insured, under the plain, comprehensive language of the Georgia statute, "*No other person can defeat the same*".

These words, as said by the District Court below, import "that no creditor can defeat the same, nor can the trustee do so"; or, as more bluntly said by the Georgia Supreme Court, referring to these words in this section, "*This is too plain for argument*".

In the case of *Roberts v. Northwestern National Life Insurance Company*, 143 *Ga.* 780, the right was reserved by the insured to change the beneficiary. He gave a note for the first premium, which was not paid at maturity, and the insured surrendered the policy of insurance, and the policy was marked canceled by the company, and the note was surrendered to the insured. The insured subsequently died and the Supreme Court of Georgia held that, notwithstanding the policy gave to the insured the right to change the beneficiary, the wife had such a vested interest in the policy that the contract of insurance could not be terminated without her consent.

> "It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a chose in action."

Steele v. Gatlin, 115 *Ga.* 931, and cases cited.

All interest of the insured in the policies having been assigned to the wife, the legal title to the choses in action was therefore in the wife, subject to certain contingencies which might divest her of this legal title. The conditions which might divest her of the title never having occurred, the legal title of these

choses in action remains in the wife, protected by §6 of the Bankruptcy Act, and the comprehensive language of the Georgia statute.

VI.

Georgia Statute Comprehensive.

Section 2498 of the Georgia Code is a broad and comprehensive statute and is intended to cover all contingencies provided for therein. If the insured directs the money to be paid to his personal representative, neither the widow nor the children can defeat such direction. If he says the policy shall be paid to his widow, neither the personal representative nor his children can defeat the same. The same is true if he gives direction that the policy should be paid to his children. It is equally true that if the insured gives direction that the policy should be paid to his assignee, then neither the personal representative, nor the widow, nor the children can defeat the same; nor should the trustee or anyone else be permitted to do so.

The fact that the word "money" is used in this statute instead of "proceeds," "avails" or some similar word should not defeat the purpose or spirit of the statute. The trustee is now seeking to recover the *proceeds* of the cash surrender value, that is, *money* to be derived from the policies.

The word "exemption," as used in the Bankruptcy Act, does not necessarily mean an exemption in the nature of a homestead, as counsel for the trustee seems to conclude. It has a broader meaning. It has been defined as "an immunity; a privilege". It may well mean any law the purpose or *effect* of which is to prevent the subjection of property by creditors.

VII.

Statutes of exemption applicable to ordinary policies protect the beneficiaries, although right reserved in the insured to change the beneficiary.

The right in the insured to change the beneficiary named in his policy, has so much justification in legitimate usefulness to the insurance company and the insured as to strongly negative

an assumption that it was devised to enable the insured, when in need, to defraud his creditors.

A beneficiary may pre-decease the insured; the beneficiary may be a minor, and the insured may desire to borrow from the insurance company, giving his policy as collateral security; after the insurance has been in force for a long time, altering circumstances may make a change in the beneficiary desirable.

In any of these events a policy made payable absolutely to a beneficiary may cause serious embarrassment to the insured and the company, because of the inability of the beneficiary, who, on account of physical or mental ill health, may be unable to execute the necessary releases. Because of the difficulty of dealing with his policies during his lifetime if they are made payable absolutely to a beneficiary, virtually all modern policies give the insured this right to change the beneficiary.

The same sound public policy of Georgia, as expressed in section 2498 of its code which encourages a man while solvent to provide for his wife and children by taking insurance, exists in practically every state of the Union (the first statute exempting life insurance proceeds from the attack of creditors having been passed in Massachusetts in the year 1844). The language of the statutes is not always identical but the purpose and effect of all of them are the same.

The questions involved in the case at bar have arisen in other jurisdictions, and the trustee's claims as made in this case have generally been denied, and this is true in policies of insurance proper (like the ones under consideration), *although the insured reserved the right to change the beneficiary.*

In re *Young* (*D. C. Ohio*), 208 *Fed.*, 373, the Court, in construing policies like those under consideration and refusing to follow the *Loveland* case (*D. C. Mass.*), 102, *Fed.*, 1005, as being "at variance with the great current of authority, and as supported by no other decision to which we have been cited," and after citing numerous cases to sustain its conclusion says:

> "To grant the request of the trustee is to absolutely extinguish all interest of the beneficiary in these contracts; thus to wipe out all provision that the bankrupt has made for his wife and family. If that may be done, then section 9398 General Code of Ohio and section 6 of the bankruptcy law are to no purpose."

The District Court of Minnesota, in re *Johnson*, 176 *Fed.* 591, holds as follows:

> "All rights of the trustee are fixed as of the date of adjudication, and the rights of the trustee in this proceeding were thus fixed and the beneficiary named, and this policy was for the wife, the insurance was therefore for her benefit, and in my opinion it should be held exempt from the bankrupt's creditors by virtue of section 1691 (of the laws of Minnesota)."

When, in the Matter of *Orear*, 189 *Fed.* 888, it was represented to the court that the power of changing the beneficiary took the policy out of the Missouri exemption statute, the court replied that if this contention were true it would practically nullify the statute, for the reason that substantially all modern policies give the insured the right to change the beneficiary, and the right of surrendering or borrowing the reserve value of his policy.

> "If these provisions, which have for several years appeared in substantially every policy, would preclude the protection of this statute, then, when last enacted, it was a mere idle form of words and referred only to an obsolete kind of policy."

And more recently, Chief Justice Rugg said on this point, in a Massachusetts case (*Tyler v. Treasurer and Receiver-General*, 115 *N. E.* 300):

> "The contract of life insurance differs from most other contracts in that it is not intended ordinarily for the benefit of the insured, but of some dependent. Its original and fundamental conception is a provision by small periodical contributions to secure a benefit for the family. While this conception has been enlarged in some respects, *still the basic elements continue. The insured retains no ownership of that which has passed to the beneficiary under the contract. A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last.*"

In *Frederick v. Metropolitan Life Insurance Co. (W. Dist. of Pa.)*, 235 *Fed.* 639, the court says:

"The case of *Holden v. Stratton*, 198 *U. S.* 202, furnishes a rock on which we can stand. That decision has settled definitely and finally these propositions: (a) That section 6 of the Bankruptcy Act, which provides as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof, immediately preceding the filing of the petition; is couched in unlimited terms and is accompanied with no qualification whatever. (b) That it has always been the policy of Congress, both in general legislation and in bankrupt cases, to recognize and give effect to State exemption laws, and that section 6 adopts, for the purposes of bankruptcy proceedings, the exemptions allowed by the laws of the several States. (c) That section 70-a and the proviso found therein relating to insurance policies, imposes no limitation whatever upon the terms of section 6. That this section does not deal with exemptions, but solely with the nature and character of the property the title to which passes to the trustee in bankruptcy, and that all exempt property is excluded from its provisions."

The Court further says:

"But it is assumed that the whole case is changed by the reservation of the right of the assured to change the beneficiary. This clause has the legal effect of changing the interest of the beneficiary from a vested, to an inchoate or expectant interest. But I cannot see why from that fact the court should find the policy was not taken out for the benefit of the wife. An insurer knows that time may bring a very material change in conditions. The marital relation itself is unfortunately subject to many vicissitudes, such as death, divorce or separation. In the lapse of a few years the dependent may become independent, and those now strong may demand our aid and assistance. To reserve the right to change one's mind if circumstances demand it, is in harmony with the whole course of human action. It is only

> the part of wisdom to take into consideration the ever-changing conditions of men. Persons frequently revoke their wills, add codicils, and change devisees, to meet conditions as they arise; and it is only natural that a husband who takes out a life policy for the benefit of his wife, should reserve to himself the power to change the beneficiary if unexpected conditions should arise which make it necessary or advisable. We should remember that exemptions in favor of the wife, children or other dependents, are favorites of the law."

The following cases hold to the same effect, upholding the State exemption statutes, although the policies gave to the insured the right to change the beneficiary.

Pulsifer v. Hussey, 97 *Me.*, 434; 54 *Atl.*, 1076.
In re Pfaffinger (*D. C. Ky.*), 164 *Fed.*, 526.
In re Whelpley (*D. C. N. H.*), 169 *Fed.*, 1019.
In re Fetterman (*D. C. Ohio*), 39 *Am. B. R.*, 834.
In re Jones (*D. C. Md.*), 41 *Am. B. R.*, 467.

In *Allen v. Central Wisconsin Trust Co.*, 143 *Wis.* 381, 127 *N. W.* 1003, the Court held:

> "Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what grounds it can be claimed that the trustee is concerned with what may afterwards become of the exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt. At that time this policy was exempt and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do."

In Georgia, a bankrupt may assign a homestead allowed him under the State law in settlement of *his own* pre-existing debt; but this fact does not prevent the Bankruptcy Court from setting aside a homestead allowed under the Georgia law.

Taylor v. Williams, 139 *Ga.*, 581.

No reason is apparent why any different rule should be applicable to a life insurance policy otherwise exempt under the

State statute, because, having reserved the right to change the beneficiary, it is contended he may, *after bankruptcy*, exercise this right and make it payable to himself or some one else.

VIII.

Decisions Apparently Contra Distinguished.

In practically every case relied on by the trustee, an analysis of the case will disclose that they were rendered prior to the decision of *Holden v. Stratton, supra*, and no question of a State statute was considered (as in re *Coleman*, 136 *Fed.*, 818); or the statute was entirely different or the policy or trust certificate was in the nature of a "tontine" policy (as in re *White*, 174 *Fed.*, 333—Coxe, J. dissents—and in re *Hettling*, 175 *Fed.*, 65); or there was no State statute or if one, all the debts scheduled had matured before its passage and the statute was held not to be retroactive (as in re *Bonvillian*, 232 *Fed.*, 270); or no question of State exemption was involved (as in re *Dolan*, 182 *Fed.*, 949, and in re *Draper*, 211 *Fed.*, 230); or the policy was an endowment or investment policy *payable to the insured* at a specified time, or in the event of his death, prior to that time, to his wife (as in re *Herr*, 182 *Fed.*, 716, in re *Diack*, 100 *Fed.*, 770, and in re *Churchill*, 198 *Fed.*, 711).

The Court below cites two cases to support the opinion—in re *Herr*, 182 *Fed.*, 716, and in re *Bonvillian*, 232 *Fed.*, 370.

In the *Herr* case the policy was payable to the bankrupt, and only contingently to the wife, and this distinction is recognized by the other district courts in Pennsylvania.

In the *Bonvillian* case all of the debts scheduled had matured before the passage of the Louisiana statute, and the statute was held not to be retroactive; and in the recent case of *Rosenberg et al*, 236 *Fed.*, 812, the same district court decided that the time the debts were scheduled by the bankrupt was the test of the exemption under the Louisiana statute, and the same district judge held that the Bonvillian case was not controlling where the debts were contracted after the passage of the Louisiana statute of exemption.

IX.

Statutes of exemption or for benefit of beneficiaries of life insurance should be liberally construed and given effect by the Court.

This statement of the law is recognized by decisions of the Courts, both State and Federal, with practically judicial unanimity.

Roberts v. Northwestern Nat'l Life Insurance Co. 143 *Ga.*, 780. 11 *R. C. L.*, 492.

In re Kane, 127 *Fed.*, 552.

In re Arkin, 231 *Fed.*, 947.

Holden v. Stratton, 198 *U. S.*, 214.

In *Central National Bank v. Hume*, 128 *U. S.*, 203, this Honorable Court said:

> "It seems to us that the same public policy which recognizes the support of wife and children as a positive obligation in law as well as in morals should be extended to protect them from destitution after the debtor's death by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already or which could thereby be lawfully obtained, at least to the extent of requiring that in such circumstances the fraudulent intent of both parties should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered."

In *Eaton, Trustee, v. Boston Safe, etc. Co.*, 240 *U. S.*, 427, the reasoning of the Court appears to be destructive of the claims now presented by the trustee. The Court concludes that decision as follows:

> "The policy of the Bankruptcy Act is to respect State exemptions, and until the Massachusetts decisions shall have gone further than they yet have, we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

X.

CONCLUSION.

We think, therefore, that, giving full effect to section 6 of the Bankruptcy Act and a fair and liberal construction to section 2498 of the Georgia Code, it inevitably follows that the trustee has no interest in the policies in question and that the rights of the insured and his wife therein, under the Georgia statute, should be protected by this Honorable Court.

Respectfully submitted,

J. R. POTTLE,
I. J. HOFMAYER,
J. W. KIEVE,
Attorneys for Petitioner and
of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

No. 96.

A. S. COHN, Petitioner,

v.

R. A. MALONE, Trustee
of A. S. COHN, Bankrupt,
Respondent.

BRIEF OF RESPONDENT

Each of the life insurance policies had a cash surrender value, (Record pp. 2, 12, 14, 23 and 30.) One of these policies was payable to Cohn's estate and the other to certain relatives of his as beneficiaries; and it was provided in the policies and in the assignments that Cohn reserved the absolute right to change the beneficiaries without the latter's consent. (Record pp. 8, 9, 14, 15, 16, 23, 29 and 30.) Thus it will be seen that this case is controlled by the decision in Cohen v. Samuels, 245 U. S., 50. In fact, one of the policies involved in the Samuels case was in the Penn Mutual Life Insurance Company (Record Samuels case, p. 28) and was almost, if not quite, identical with those in the case at bar, which are in that company.

THERE IS NO GEORGIA LAW EXEMPTING FROM LIABILITY FOR THE DEBTS OF THE INSURED THE CASH VALUE OF LIFE INSURANCE POLICIES HELD BY HIM.

Properly construed, section 2498 of the Code of Georgia merely gives the assured the right to direct to whom the insurance "money" shall be paid at his death, but does not exempt "the cash surrender value."

The contention that the disposition of the cash surrender value of the policies is controlled by this Code section is well answered in the opinion of the Circuit Court of Appeals. (Record p. 30.)

This Code section should be construed in connection with the decision of the Supreme Court of Georgia (Greenville v. Crawford, 13 Ga. 355), from which it was codified.

"In the codification of the laws it is almost impossible to go into all the details of the different statutes codified. Where the Code sections are incomplete or ambiguous, they must be construed in connection with the original Acts."

Bacon v. Jones, 116 Ga., 136, 139.
Smith v. Evans, 125 Ga., 109, 112.

A full discussion of this Code section was given in our brief in the Circuit Court of Appeals, beginning on page 5, copies of which were filed in this Court in opposition to the petition for certiorari, and which we assume are now on file with the record.

Respectfully submitted,
JOHN D. POPE,
SAM S. BENNET,
H. A. PEACOCK,
CHARLES AKERMAN,
Attorneys for Respondent.